(33)

No. 06-84

Title:	Safeco Insurance Company of America, et al., Petitioners v. Charles Burr, et al.
Docketed:	July 20, 2006
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(04-35313)
Decision Date:	August 4, 2005
Rehearing Denied:	April 20, 2006

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 19 2006	Petition for a writ of certiorari filed. (Response due August 21, 2006)
Aug 15 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents.
Aug 16 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Aug 21 2006	Brief amicus curiae of Mortgage Insuance Companies of America filed. VIDED.
Aug 21 2006	Brief amicus curiae of Property Casualty Insurers Association of America filed. VIDED.
Aug 21 2006	Brief amicus curiae of Financial Services Roundtable filed. VIDED.
Aug 21 2006	Brief amici curiae of American Insurance Association and the National Association of Mutual Insurance Companies filed. VIDED.
Aug 21 2006	Brief amicus curiae of FreedomWorks Foundation filed. VIDED.
Aug 21 2006	Brief of respondents Charles Burr, et al. in opposition filed. VIDED.
Aug 21 2006	Brief amici curiae of Chamber of Commerce of the United States and Business Roundtable filed. VIDED.
Sep 6 2006	DISTRIBUTED for Conference of September 25, 2006.
Sep 6 2006	Reply of petitioners Safeco Insurance Company of America, et al. filed. (Distributed).
Sep 26 2006	Petition GRANTED The case is consolidated with No. 06-100 and a total of one hour is allotted for oral argument.
Sep 28 2006	Consent to the filing of amicus briefs in support of either party received from counsel for petitioners.
Sep 29 2006	Consent to the filing of amicus briefs in support of either party received from counsel for respondents Edo, Massey and Burr.
Oct 31 2006	SET FOR ARGUMENT ON Tuesday, January 16, 2007.
Nov 13 2006	Brief amici curiae of Farmers Insurance Company of Oregon, et al. filed.

VIDED.

Nov 13 2006 Brief of petitioners Safeco Insurance Company of America, et al. filed.

Nov 13 2006 Joint appendix filed.

Nov 13 2006 Brief amicus curiae of Ford Motor Company filed. VIDED.

Nov 13 2006 Brief amici curiae of Mortgage Insurance Companies of America and Consumer Mortgage Coalition filed. VIDED.

Nov 13 2006 Brief amicus curiae of Consumer Data Industry Association filed. VIDED.

Nov 13 2006 Brief amicus curiae of American Insurance Association filed. VIDED.

Nov 13 2006 Brief amicus curiae of National Association of Mutual Insurance Companies filed. VIDED.

Nov 13 2006 Brief amicus curiae of FreedomWorks Foundation filed. VIDED.

Nov 13 2006 Brief amicus curiae of Property Casualty Insurers Association of America filed. VIDED.

Nov 13 2006 Brief amicus curiae of Washington Legal Foundation filed. VIDED.

Nov 13 2006 Brief amicus curiae of United States in support of vacatur filed. VIDED.

Nov 13 2006 Brief amicus curiae of Trans Union LLC filed. VIDED.

Nov 14 2006 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.

Nov 17 2006 CIRCULATED.

Nov 30 2006 Record received from U.S.D.C. for the District of Oregon. (2 boxes)

Dec 1 2006 Record received from U.S.C.A. for 9th Circuit. (1 envelope)

Dec 11 2006 Application (06A572) to file a consolidated respondents' brief on the merits in excess of the page limitation., submitted to Justice Kennedy.

Dec 13 2006 Application (06A572) granted by Justice Kennedy to file a consolidated respondents' brief on the merits in excess of the page limitation.

Dec 18 2006 Brief amici curiae of National Consumer Law Center, Inc., et al. filed. VIDED. (Distributed)

Dec 18 2006 Brief amici curiae of Oregon, et al. filed. VIDED. (Distributed)

Dec 18 2006 Brief amici curiae of Insurance Commissioners of the States of Delaware, et al. filed. VIDED. (Distributed)

Dec 18 2006 Brief of respondents Charles Burr, et al. filed. VIDED. (Distributed)

Dec 18 2006 Lodging request received from respondents. VIDED.

Jan 5 2007 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. VIDED.

Jan 9 2007 Reply of petitioners Safeco Insurance Company of America, et al. filed. (Distributed)

Jan 16 2007 Argued. For petitioners: Maureen E. Mahoney, Washington, D.C.; and Patricia A. Millett, Assistant to the Solicitor General, Department of Jutice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Scott A. Schorr, Portland, Ore.

Supreme Court, U.S.
FILED

06-84 JUL 1 3 2006

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No. ____

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 19, 2006

QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a defendant can be found liable for a "willful" violation of the Fair Credit Reporting Act ("FCRA") upon a finding of "reckless disregard" for FCRA's requirements, in conflict with the unanimous holdings of other circuits that "willfulness" requires actual knowledge that the defendant's conduct violates FCRA.

PARTIES TO THE PROCEEDINGS

Petitioners Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Safeco Corporation was named as a defendant in the original complaint but subsequently was voluntarily dismissed from the case by plaintiffs during the district court proceedings.

Charles Burr and Shannon Massey were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings. Lori Spano, Alan Opoien, Patricia McGrath, and Joan Horton were also at one time or another, and some still are, plaintiffs in the district court proceedings, but none of them participated in the court of appeals proceedings and thus are not respondents to this petition.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon state the following:

Safeco Insurance Company of Oregon is a wholly owned subsidiary of Safeco Insurance Company of America. Safeco Insurance Company of America, American States Insurance Company, and Safeco Insurance Company of Illinois are wholly owned subsidiaries of Safeco Corporation, a publicly traded company. Safeco Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

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Petitioners Safeco Insurance Company of America ("Safeco-America"), American States Insurance Company ("American States"), Safeco Insurance Company of Illinois ("Safeco-Illinois"), and Safeco Insurance Company of Oregon ("Safeco-Oregon") (collectively, "Safeco") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case presents a square circuit conflict on an important and recurring question of federal statutory construction. Under § 616 of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* ("FCRA"), defendants can be held liable for actual damages or statutory damages of up to $1,000 per violation, punitive damages, attorney's fees, and costs for any "willful" violation of FCRA's substantive requirements. 15 U.S.C. § 1681n.[1] Unlike other federal consumer credit provisions, such as the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B), and the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b), FCRA contains no limit on the amount of damages (actual, statutory, or punitive) that can be recovered in a consumer class action.[2] Under the settled law of all other circuits to address the issue, liability for "willful" conduct must be based upon a showing that the defendant knew that its conduct violated FCRA. In the decision below, however, the Ninth Circuit departed from this unanimous view and held that insurers, banks, and the many other businesses covered by FCRA can be held liable under § 616 in circumstances where they act with "reckless disregard" of the law's requirements.

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[1] Under § 617 of FCRA, plaintiffs' recovery for "negligent" violations is limited to actual damages plus costs and attorney's fees. 15 U.S.C. § 1681*o*.

[2] Courts have held that actual damages are not a prerequisite to recovery of punitive damages under § 616 of FCRA. *See, e.g., Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 972 (4th Cir. 1987).

The Ninth Circuit acknowledged the square conflict between its view and those of the Sixth and Eighth Circuits on this purely legal question, and noted specifically that "[t]he Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law." Pet. App. 128a n.17. In fact, the split is considerably deeper than that: eight circuits have held that "willfulness" requires actual knowledge of what the law requires, and three circuits, namely the Sixth, Seventh, and Eighth, have specifically rejected the Ninth Circuit's "reckless disregard" alternative.

Moreover, the Ninth Circuit exacerbated the split by defining "reckless disregard" in broad fashion, such that liability may be imposed on companies for failing to anticipate future judicial decisions on issues of first impression under FCRA, notwithstanding good-faith reliance on advice of counsel. In elaborating its unprecedented "reckless disregard" standard, the Ninth Circuit held that reliance on advice of counsel is "not dispositive," out of a concern that attorneys would deliberately engage in "creative lawyering that provides indefensible answers" to unresolved legal questions. *Id.* at 129a. The Ninth Circuit's broad understanding of liability under § 616 of FCRA will require companies to incur the needless and considerable expense of attempting to conform their conduct to the broadest conceivable interpretation of the statute. Importantly, moreover, the Ninth Circuit adopted this extreme interpretation in the context of a purported nationwide class action, which would potentially impose the Ninth Circuit's minority views on the operations of these defendants as to their customers *throughout the country*, effectively overruling the contrary law of other circuits.

The Ninth Circuit's decision thus threatens to impose significantly greater liability on defendants than they would face in other circuits. Indeed, this case presents a good example of the problem. Substantively, the Ninth Circuit held, in a ruling that had never been previously adopted by any court (and in fact was contrary to prior

federal court decisions), that an insurance company (or any other user of consumer information) is required to provide notice to consumers when it relies on information contained in the consumer's credit report in deciding not to offer that consumer the best possible rate in an initial policy of insurance. The Ninth Circuit so held even though the statute requires notice only where there has been "an *increase* in any charge for . . . any insurance," 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added), and, based on that language, the district court had concluded that an initial charge for insurance could not be subject to this notice requirement. Given the absence of any prior judicial guidance that notice was required in this factual circumstance, defendants' violations could not have been "knowing" and "intentional" under the standard adopted by the other eight courts of appeals that have addressed the issue. The district court's dismissal of this action would thus have been affirmed in those circuits. In conflict with those decisions, the Ninth Circuit held that defendants could still be held liable for "reckless disregard" of the law, and it remanded the case with instructions to the district court to allow an intrusive inquiry into defendants' corporate decision-making processes and advice of counsel. *See* Pet. App. 2a; *id.* at 127a-129a.

The resolution of this issue is of enormous importance to insurance companies, credit card companies, mortgage companies, and the wide range of other businesses that are subject to the requirements of FCRA. In the context of this case alone, the Ninth Circuit's dilution of § 616's willfulness standard threatens insurance companies such as Safeco with tens of billions of dollars in statutory damages, in addition to potentially enormous punitive damages and attorney's fees, for their failure to anticipate the Ninth Circuit's novel interpretation of FCRA's adverse-action notice requirement. More broadly, FCRA continues to be the subject of substantial litigation, and there is still considerable uncertainty about basic questions regarding this statute's scope. The Ninth Circuit's erroneous inter-

governing "furnishers of information"). Furnishers of information include a wide range of businesses that deal with consumer credit, including credit card companies, auto finance companies, and mortgage banking institutions. Information furnishers must, among other things, provide accurate information to credit reporting agencies; investigate disputed information from customers; and inform customers about negative information that may be put on their consumer report. *See id.*

FCRA also imposes obligations on a third category of businesses – namely, users of consumer reports. *See id.* § 1681m. Users of consumer reports include insurance companies such as Safeco, as well as consumer credit companies and employers. As relevant here, any user of consumer credit information is required by FCRA to provide "adverse action" notices to consumers when they deny credit, insurance, or employment, or take certain other adverse actions, based on information contained in a consumer report. *Id.* § 1681m(a).

2. Safeco offers a wide range of insurance products to consumers nationwide, including automobile, homeowners, renters, and small-business policies. Safeco-America is a sister company to Safeco-Illinois and American States. Safeco-Oregon is a wholly owned subsidiary of Safeco-America. All four insurance companies are wholly owned subsidiaries of Safeco Corporation, a publicly traded holding company. All of the companies operate independently and have separate boards of directors. *See* Pet. App. 17a.

On October 2, 2001, plaintiff Lori Spano filed a purported nationwide class action against Safeco Corporation for alleged violations of § 615 of FCRA, which requires "any person" to provide notice to a consumer if that person "takes any adverse action with respect to [that] consumer that is based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a). Spano alleged that Safeco Corporation took adverse actions against her and others similarly situated

with respect to the underwriting of insurance as a result of information contained in their consumer credit reports, without providing them with the notice required by § 615. *See* Pet. App. 23a. The complaint alleged no actual damages, but sought statutory damages, punitive damages, and attorney's fees. *See id.* at 4a, 26a.

As to herself, Spano claimed that she purchased an automobile insurance policy from Safeco National Insurance Company that was subsequently endorsed to Safeco-Oregon. The policy was cancelled four times for failure to pay the premium; each time, it was reinstated by Safeco-Oregon without reference to any consumer credit information. After the policy was cancelled for a fifth time, Spano requested that Safeco-Oregon reinstate it yet again. Safeco-Oregon declined to do so, based in part on information contained in a consumer credit report. Spano alleged that this decision not to reinstate was an "adverse action" under FCRA entitling her to notice. *See id.* at 4a, 5a.

Spano later added other named plaintiffs, including respondents Massey and Burr. *See* S.E.R.[3] 1-5. Burr applied for automobile insurance in July 2001, and he was issued a policy by American States. *See* Pet. App. 4a. American States underwrote the policy through InsurQuest, a program designed for high-risk drivers. *See* E.R. 4. InsurQuest places drivers into one of five pricing tiers, designated A through E, based on the totality of the driver's underwriting characteristics. *See id.* Burr was placed in Tier D, mainly because of his poor driving record. *See id.* Although his consumer credit information was consulted in placing him in Tier D, even the most favorable credit score would not have improved his tier placement and his premium would not have changed. *See id.*; Pet. App. 4a. After the American States policy lapsed for failure to pay premiums on July 7, 2002, Burr pur-

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[3] References to "E.R." and "S.E.R." are to the Excerpts of Record and Supplemental Excerpts of Record, respectively, filed in the court of appeals.

chased a new policy from Safeco-Oregon, which relied on information in Burr's consumer credit report in setting the amount of Burr's initial premium. *See* Pet. App. 4a-5a.

Massey applied for renters insurance from Safeco-Illinois in January 2001. Safeco-Illinois has three tiers of renters insurance. Safeco-Illinois used a consumer credit report in connection with the underwriting of Massey's policy. Based on the totality of the circumstances relevant to her application, Safeco-Illinois placed Massey in a tier with a higher premium rate. *See id.* at 4a.

After Burr and Massey were added as plaintiffs, plaintiffs voluntarily dismissed Safeco Corporation as a defendant and instead substituted Safeco-America. Safeco-America moved to dismiss on the ground that the policies purchased by the three named plaintiffs were not issued by Safeco-America, but by its affiliates, Safeco-Oregon, Safeco-Illinois, and American States ("the Issuing Companies"). In an opinion and order dated April 21, 2003, the district court granted Safeco-America's motion for summary judgment, holding that only a person who contracts with the insured can take an "adverse action" under 15 U.S.C. § 1681m(a). *See id.* at 20a-22a. The district court also granted plaintiffs' motion to file a Fourth Amended Complaint substituting the Issuing Companies as defendants. *See id.* at 34a.

As relevant to plaintiffs' claims, FCRA defines "adverse action" to mean "a denial or cancellation of," or "an increase in any charge for," any insurance. *Id.* § 1681a(k)(1)(B)(i). On March 3, 2004, the district court granted the Issuing Companies' motion for summary judgment against Burr and Massey on the ground that no "adverse action" had been taken against either of them. Pet. App. 11a-12a. Relying on its previous decision in *Mark v. Valley Insurance Co.*, 275 F. Supp. 2d 1307, 1316-17 (D. Or. 2003), which was the only reported decision to address the question, the district court agreed with the Issuing Companies that the "common and ordinary meaning of

§ 1681a(k)(1)(B)(i) is that an insurer takes an adverse action when it 'makes greater,' i.e., 'increases,' the price previously demanded of the insured for insurance." Pet. App. 11a (internal quotation marks omitted). Accordingly, the district court held that that section "unambiguously means an insurer does not increase a charge for insurance unless the insurer charges an insured one price for insurance and then subsequently increases that charge based on information in the insured's consumer credit report." *Id.* at 11a-12a (internal quotation marks omitted); *see also Mark*, 275 F. Supp. 2d at 1317 (FCRA "reasonably cannot be read to mean an insurer takes adverse action if it initially charges an insured more than its optimal rate based on information in the insured's consumer credit report"). The district court thus dismissed the claims of Burr and Massey because neither had existing policies with the issuing company at the time they applied for insurance. Pet. App. 12a.

As to plaintiff Spano, however, the district court denied the Issuing Companies' motion for summary judgment. The district court held that Spano's "request for reinstatement" of her previously cancelled policy was an "application for insurance" that was "denied" by Safeco-Oregon on the basis of information in her consumer credit report, triggering FCRA's notice requirement. *Id.* at 12a-13a.

3. After the district court entered final judgment against plaintiffs Burr and Massey under Federal Rule of Civil Procedure 54(b), they appealed. The Ninth Circuit reversed the grant of summary judgment to the Issuing Companies, based on the reasoning in its concurrently filed decision in *Reynolds* and *Edo*. Whereas the district court had concluded that the meaning of "increase" "unambiguously" required an additional charge for a preexisting policy, and thus could not apply to a "single initial charge for the insurance coverage," Pet. App. 11a-12a, the Ninth Circuit concluded that the "clear" and "ordinary meaning" of "increase" covered "a charge that is higher

than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price," *id.* at 114a-117a. *See id.* at 1a-2a.

Again relying on *Reynolds* and *Edo*, the Ninth Circuit also rejected the Issuing Companies' alternative ground for affirmance – namely, that their conduct was not "willful," and therefore could not give rise to civil liability under § 616 of FCRA. The Ninth Circuit held that a "willful" violation of FCRA could be established if a company performs an act that in fact violates FCRA "either knowing that the action violates the rights of consumers or in reckless disregard of those rights." *Id.* at 128a-129a; *id.* at 2a. Under this standard, the Ninth Circuit opined that "unlikely answers to 'issues of first impression'" could be the basis of a finding of "reckless disregard" for FCRA's requirements, even where those answers were based on advice of counsel. *Id.* at 128a. The Ninth Circuit acknowledged that its holding was at odds with that of the Sixth and Eighth Circuits, both of which have rejected a "reckless disregard" standard and require "actual knowledge with regard to the law." *Id.* at 128a n.17.

Finally, the Ninth Circuit also reversed the district court's grant of summary judgment to Safeco-America based on its holding in *Reynolds* and *Edo* that a company need not have issued an insurance policy to have taken an "adverse action" requiring notice under FCRA. *See id.* at 2a; *id.* at 122a-125a.

In its initial opinion in *Reynolds* and *Edo* dated August 4, 2005, the Ninth Circuit panel was divided on the proper disposition of the case. The panel majority, consisting of Judge Reinhardt and Judge Berzon, not only reversed the district court's grant of summary judgment to the defendant companies, but effectively granted summary judgment to the plaintiffs, despite the fact that the plaintiffs had never requested such relief. The panel majority opined that the companies' interpretation of the meaning of "adverse action" was "not reasonable," "objectively unmeritorious," and thus "in reckless disregard of the con-

sumers' statutory rights." *Id.* at 64a-66a. Judge Bybee dissented, stating that he would remand the case because he "[could not] conclude on the basis of the record before [him] that the companies' actions . . . were so 'objectively unmeritorious' . . . that [the court] [could] decide their willfulness . . . without the benefit of findings of fact." *Id.* at 68a.

Upon petition for rehearing and rehearing *en banc*, the panel issued a modified opinion on October 3, 2005.[4] The panel majority's modified opinion merely altered several phrases in the initial opinion – for example, replacing the characterizations "unreasonable" and "not reasonable" with "indefensible" and "untenable," and "objectively unmeritorious" with "plainly unmeritorious." *Id.* at 96a-97a. In response, Judge Bybee expanded his dissent. He stated that, on the record before him, he would "not find that the companies willfully failed to comply with FCRA as a matter of law." *Id.* at 100a. Although Judge Bybee agreed with the majority that the district court's interpretation of § 1681a(k)(1)(B)(i) was incorrect, he could not conclude that "the district court's conclusion, like the companies' position, was also untenable." *Id.*

After a second petition for rehearing and rehearing *en banc*, the panel issued yet another modified opinion on January 25, 2006. This time, the panel acceded to Judge Bybee's disposition of the case. Instead of effectively granting summary judgment to the plaintiffs on the ground that the defendants' conduct was willful as a matter of law, the court remanded the case for the district court to apply the "reckless disregard" standard in the first instance. *See id.* at 129a. In so doing, the court revised its opinion to conclude only that "some" of the defendants' interpretations of FCRA were "implausible," and

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[4] The panel amended its October 3, 2005 opinion *sua sponte*, in an unpublished order issued on October 24, 2005. That amendment affected only footnote 7 and was incorporated into the October 3 opinion reported at 426 F.3d 1020 (reproduced at Pet. App. 69a-101a).

it instructed that, on remand, the "willfulness" inquiry should depend on "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* The Ninth Circuit rejected the companies' contention that their reliance on advice of counsel negated a "reckless disregard" finding, on the ground that such a holding would "create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 128a.

The defendants in *Reynolds* and *Edo*, as well as the Issuing Companies, filed for rehearing and rehearing *en banc* on February 14, 2006. On April 20, 2006, the Ninth Circuit denied *en banc* review. *See id.* at 36a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for two reasons. First, as the Ninth Circuit acknowledged, its holding creates a split among the circuits on a pure question of law: the level of intent necessary for civil liability under § 616 of FCRA. Eight courts of appeals have held that civil liability for willful violations under § 616 requires that the defendant act "knowingly," "intentionally," or with "conscious disregard" of the law. This standard has always required actual knowledge that one's acts violate FCRA. Moreover, the Sixth, Seventh, and Eighth Circuits have correctly and specifically held that mere "reckless disregard" of the law's requirements does not constitute a "willful" violation under this standard. The Ninth Circuit's "reckless disregard" standard thus represents a significant and unwarranted departure from these longstanding precedents.

If the decision below is allowed to go unreviewed, nationwide class actions seeking statutory and punitive damages for "willful" violations of FCRA will undoubtedly be filed in the Ninth Circuit, effectively nullifying the considered opinions of eight other circuit courts and making

the Ninth Circuit's decision the law of the land. Indeed, since the decision below was issued, numerous nationwide class actions, often with named plaintiffs residing in other circuits, have already been filed under § 616 of FCRA in district courts in the Ninth Circuit.[5] The need for review of this clear and acknowledged circuit split is thus especially compelling.

Second, the question presented is of enormous practical importance to the broad range of American businesses that are regulated by FCRA and, in particular, national companies that will inevitably be subject to nationwide consumer class actions brought in the Ninth Circuit. Under the standard set forth in the decision below, reliance by businesses on opinions by counsel that are later deemed "implausible" by an appellate court "may constitute reckless disregard for the law and therefore amount to a willful violation of the law," even where there is no judicial guidance as to the relevant legal issue at the time of the defendants' conduct or, as in this case, there are subsequent judicial opinions vindicating the defendants' actions. *See* Pet. App. 129a. If that ruling is allowed to stand, companies will be forced into the untenable position of second-guessing their counsel's legal advice, or else risk potentially enormous statutory and punitive damages. Moreover, they will be forced to incur significant costs to protect themselves against the broadest possible interpretations of FCRA, even though those interpretations have not, as yet, been adopted by any court and may even, as was the case here, be contrary to lower court interpretations. The decision correspondingly invites intru-

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[5] *See, e.g., Vann v. Lewis Hastie Receivables Inc.*, No. 06-CV-95 (S.D. Cal. filed Jan. 17, 2006) (California named plaintiff); *Newman v. Capital One Servs., Inc.*, No. 05-CV-5409 (N.D. Cal. filed Dec. 29, 2005) (Colorado named plaintiffs); *Luther v. 1-800-BAR NONE*, No. 05-CV-4026 (N.D. Cal. filed Oct. 5, 2005) (Illinois named plaintiff); *Hogan v. PMI Mortgage Ins. Co.*, No. 05-CV-3851 (N.D. Cal. filed Sept. 23, 2005) (Texas and Georgia named plaintiffs); *Putkowski v. Irwin Home Equity Corp.*, No. 05-CV-3289 (N.D. Cal. filed Aug. 12, 2005) (Florida named plaintiff).

sive factual investigation into the attorney-client relationship – a result that FCRA's willfulness standard was designed to avoid – without even any assurance that a good-faith opinion of counsel will preclude liability. It thus provides the worst of all worlds to the many businesses that are potential FCRA defendants.

I. THE DECISION BELOW CONFLICTS WITH LONGSTANDING JUDICIAL INTERPRETATION OF FCRA'S WILLFULNESS REQUIREMENT

A. The Decision Below Conflicts with the Precedents of At Least Three Other Courts of Appeals, Which Have Specifically Rejected the Ninth Circuit's "Reckless Disregard" Standard

Three federal courts of appeals have, in square conflict with the decision below, recognized that a "willful" violation of FCRA must be committed with knowledge of what the law demands, and that reckless disregard for the law is insufficient to support civil liability under § 616.

In *Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. 2002), the Eighth Circuit examined "what state of mind amounts to willfulness" under § 616 in a case alleging that the defendants obtained the plaintiff's credit report for an impermissible purpose in violation of 15 U.S.C. § 1681b(f). *Id.* at 368. Reviewing its own circuit precedent, the court noted that it had previously held that, "[t]o show willful noncompliance with the FCRA, [the plaintiff] must show that [the defendant] knowingly and intentionally committed an act in conscious disregard for the rights of others." *Id.* (citing *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998) (willfulness requires that the defendant "knowingly and intentionally committed an act in conscious disregard for the rights of others")) (internal quotation marks omitted; alterations in original). Examining this requirement, the court stated that "[t]he statute's use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful." *Id.* It thus concluded that "willful noncompliance under section [616]

requires knowing and intentional commission of an act the defendant knows to violate the law." *Id.* at 370. The court also specifically rejected the contention – accepted by the Ninth Circuit in the decision below – that "recklessness is equivalent to willfulness under section [616]." *Id.* at 369.

In *Duncan v. Handmaker*, 149 F.3d 424 (6th Cir. 1998), the Sixth Circuit similarly held that civil liability for "willful noncompliance" requires that "the party acted knowingly and willfully." *Id.* at 429. On this basis, the court held that defendants "cannot be held civilly liable" for obtaining a consumer credit report for an improper purpose, in violation of 15 U.S.C. § 1681b, "'under what is believed to be a proper purpose under the statute but which a court . . . later rule[s] to be impermissible legally under § 1681b.'" *Id.* (quoting *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 370 (6th Cir. 1984) (Wellford, J., concurring)) (alterations in original); *accord Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 364 (6th Cir. 2005) (for plaintiff to be eligible for punitive damages under § 616, "the defendant must have committed a willful violation by knowingly and intentionally committing an act in conscious disregard for the rights of others"). The Sixth Circuit's decision in *Duncan* is at odds with the Ninth Circuit's holding below that defendants *can* be held civilly liable for "willful noncompliance," notwithstanding the lack of any judicial decision establishing FCRA's applicability to initial policies of insurance, and therefore the lack of any knowledge that its failure to provide notice was in violation of § 615.

Likewise, the Seventh Circuit in *Wantz v. Experian Information Solutions*, 386 F.3d 829 (7th Cir. 2004), held, in agreement with the Eighth Circuit's decision in *Phillips*, that, "[t]o act willfully, a defendant must knowingly and intentionally violate the Act, and it 'must also be conscious that [its] act impinges on the rights of others.'" *Id.* at 834 (quoting *Phillips*, 312 F.3d at 368) (second alteration in original); *accord Ruffin-Thompkins v. Experian*

Info. Solutions, Inc., 422 F.3d 603, 610 (7th Cir. 2005) (quoting *Wantz*). The requirement that the defendant "be conscious" that its act is unlawful is also inconsistent with the Ninth Circuit's "reckless disregard" standard.[6]

Had this case been heard in any of these other three circuits, the district court's decision granting summary judgment to defendants would have been affirmed. As a matter of law, defendants could not have known that they were violating FCRA's notice provisions given the absence of a single judicial opinion in the 35 years since FCRA's passage holding that these provisions are triggered in the context of initial policies for insurance and, further, given the fact that defendants' legal position on that question was later adopted in multiple district court decisions. *See, e.g., Stevenson v. TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993) (because "[t]here was no prior guidance to suggest that [defendant's] notice was insufficient," the court "[could]not conclude that [it] knowingly and intentionally obscured the notice in conscious disregard of consumers' rights"). The Ninth Circuit's decision is thus in square conflict with the decisions of the Sixth, Seventh, and Eighth Circuits.

B. Five Other Circuits Have Also Held That "Willfulness" Requires "Knowing" or "Conscious" Disregard of the Law

The decisions of the Sixth, Seventh, and Eighth Circuits are in accord with the decisions of every other court of appeals to address the *mens rea* required under § 616 – including the Second, Third, Fourth, Fifth, and Tenth Circuits. Each of these courts has stated that "willfulness"

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[6] Indeed, the decision below is at odds with the decision of another panel of the Ninth Circuit in an unreported case. *See Arriola v. Safeco*, No. 92-35321, 1993 WL 530480 (9th Cir. Dec. 21, 1993) (judgment noted at 15 F.3d 1082). As that panel wrote, "[t]he willfulness requirement under [§ 616] is synonymous with the requirement of 'intent' in criminal statutes," which requires knowledge and specific intent to commit an unlawful act. *Id.* at *1 (affirming the district court's grant of judgment to defendants as a matter of law).

requires "knowingly and intentionally" committing an act in "conscious" or "deliberate and purposeful" disregard of the statutory requirements of FCRA. In the words of the Fourth Circuit, "[t]o prove willfulness under [§ 616 of FCRA], [p]laintiffs must 'show that the defendant knowingly and intentionally committed an act in conscious disregard for the rights of the consumer.'" *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003) (quoting *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001)); *see Northrop v. Hoffman of Simsbury, Inc.*, 12 F. App'x 44, 50 (2d Cir. 2001) ("[t]o show willful noncompliance, a plaintiff must show that a defendant 'knowingly and intentionally committed an act in conscious disregard for the rights of others'") (quoting *Bakker*, 152 F.3d at 1013); *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996) ("[t]o show willful noncompliance with the FCRA, [a plaintiff] must show that defendants 'knowingly and intentionally committed an act in conscious disregard for the rights of others'") (quoting *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986));[7] *Stevenson*, 987 F.2d at 293 ("To be found in willful noncompliance, a defendant must have 'knowingly and intentionally committed an act in conscious disregard for the rights of others.'") (quoting *Pinner*, 805 F.2d at 1263); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir.

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[7] The Ninth Circuit purported to follow the Third Circuit's decision in *Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997). In that case, the Third Circuit panel reiterated its prior holding in *Philbin* that willful noncompliance requires that a defendant "'knowingly and intentionally committed an act in *conscious* disregard for the rights of others.'" *id.* at 226 (quoting *Philbin*, 101 F.3d at 970) (emphasis added), but it then proceeded to state, without explanation for the change, that Trans Union could be liable for punitive damages under § 616 if it acted "knowing [its actions] to be in contravention of the rights possessed by consumers pursuant to FCRA or in *reckless* disregard of whether" its actions were lawful. *id.* at 227 (emphasis added). In light of its recitation of the prior holding in *Philbin*, which clearly requires actual knowledge, the *Cushman* opinion cannot plausibly be said to hold that "reckless disregard" satisfies the "willfulness" standard under § 616.

2001) (same); *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 753 (5th Cir. 2002) ("For [a] violation to be 'willful,' . . . a defendant's course of conduct must exhibit a 'conscious disregard' for or entail 'deliberate and purposeful' actions taken against a plaintiff's rights.") (quoting *Cousin*, 246 F.3d at 372); *Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (per curiam) (liability under § 616 must be predicated on a finding that defendant acted "willfully and knowingly").

The requirement that the defendant act "knowingly and intentionally" and in "conscious" or "deliberate and purposeful" disregard plainly entails an intentional refusal to abide by known legal requirements. As the Eighth Circuit explained in *Phillips*, "[u]nder this formulation the defendant must commit the act that violates the [FCRA] with knowledge that he is committing the act and with intent to do so, and he must also be conscious that his act impinges on the rights of others." 312 F.3d at 368. Indeed, whenever these circuits have applied the *mens rea* requirement of § 616 to the facts of a particular case, they have inquired whether there was evidence showing that the defendant knew that his conduct violated the law. *See, e.g., Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995) (rejecting plaintiffs' Rule 60(b) motion because proffered evidence "does not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA") (citing *Pinner*, 805 F.2d at 1263); *Yohay*, 827 F.2d at 972 & n.8 (upholding jury's verdict for plaintiff under § 616 only after finding "considerable evidence" that defendant credit union "consciously ignored" plaintiff's rights because its manager "acted purposefully and with full knowledge of what she was doing"); *Zamora*, 811 F.2d at 1370-71 (affirming jury verdict of willful violation under § 616 because trial testimony indicated that bank employees "knew the permissible purposes for obtaining consumer reports" and "knew they could not ac-

cess the records of a spouse when checking the credit of an individual").

The split among the circuits is thus wide and well developed. Eight circuit courts have held that "willfulness" requires a knowing or intentional violation, and three circuits have specifically rejected the Ninth Circuit's "reckless disregard" standard. Only the First, Eleventh, and D.C. Circuits have not expressed a view on the issue.[8] There is no indication that this division will be resolved with further percolation. Moreover, given plaintiffs' ability to file nationwide class actions in the Ninth Circuit, absent review by this Court, the Ninth Circuit's decision, though adopted by no other court, is likely to become controlling for a large percentage of FCRA litigation.

C. The Court of Appeals' Rejection of the Decisions of Its Sister Circuits Was Premised on Reasoning That Conflicts with This Court's Precedents on the Meaning of "Willfulness"

In deviating from the precedents of the other circuits, the Ninth Circuit erroneously relied on this Court's interpretation of the term "willful" in two separate provisions of two other statutes: the liquidated damages provision of

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[8] District courts in these circuits are divided on the issue as well. *Compare Veno v. AT&T Corp.*, 297 F. Supp. 2d 379, 384 (D. Mass. 2003) (Gertner, J.) ("Actions showing a 'reckless indifference' to plaintiff's rights under the FCRA can also constitute willfulness.") (citing *Barron v. Trans Union Corp.*, 82 F. Supp. 2d 1288, 1298 (M.D. Ala. 2000)), *with Graziano v. TRW, Inc.*, 877 F. Supp. 53, 56 (D. Mass. 1995) (Lindsay, J.) ("[U]nder FCRA, '[t]o constitute willful noncompliance, a party must have "knowingly and intentionally committed an act in conscious disregard for the rights of others."'") (quoting *Pinner*, 805 F.2d at 1263) (second alteration in original). *See also, e.g., Jordan v. Trans Union LLC*, No. 05-CV-305, 2006 WL 1663324, at *7 (N.D. Ga. June 12, 2006) ("Willful noncompliance requires a defendant to knowingly and intentionally commit an act in conscious disregard for the rights of others.") (citing *Cousin*, 246 F.3d at 372); *Jordan v. Equifax Info. Servs., LLC*, 410 F. Supp. 2d 1349, 1354 (N.D. Ga. 2006) ("A willful violation 'requires knowing and intentional commission of an act the defendant knows to violate the law.'") (quoting *Phillips*, 312 F.3d at 370).

ness" if an appeals court ultimately finds the defendants' legal judgment "implausible" even in the face of advice of counsel and prior district court precedent vindicating that position – finds no analogue in any Supreme Court decision interpreting such statutory language, regardless of context. The Ninth Circuit's extraordinary holding that courts must look behind lawyers' good-faith professional advice in order to prevent companies from "employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression'" (Pet. App. 128a) is a stark departure from this Court's precedents, which have never authorized such an invasive inquiry into lawyers' work product or their relationships with their clients. On the contrary, even in the very different context of the ADEA, this Court concluded that a company's actions could not have been willful *as a matter of law* where it "sought legal advice," even though the attorneys "overlooked" the key issue. *Thurston*, 469 U.S. at 130; *see id.* at 129 (company acted "reasonably and in good faith" where it consulted with lawyers to determine lawfulness of existing policy); *see also Ratzlaf v. United States*, 510 U.S. 135, 142 n.10 (1994) ("willful" violation of the federal antistructuring laws "might be negated by, *e.g.*, proof that defendant relied in good faith on advice of counsel"). The Ninth Circuit's refusal to recognize an advice of counsel defense under § 616 rests on a presumption of bad faith on the part of both lawyers and clients that is unprecedented in the decisions of this Court.

The Ninth Circuit's extreme reading is particularly inappropriate in the context of FCRA, which Congress made clear was intended to require that "consumer reporting agencies adopt *reasonable* procedures" for ensuring the accuracy of consumer reports. 15 U.S.C. § 1681(b) (emphasis added). By construing the "willfulness" provision to encompass an extremely lax notion of "reckless disregard," the Ninth Circuit's rule forces businesses to adopt unnecessary and unreasonable compliance measures in

the face of legal uncertainty, simply to guard against the risk of enormous statutory and punitive liability in the case of a finding of "reckless" disregard.

As this Court has repeatedly stated, "willful . . . is a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943); *see also United States v. Murdock*, 290 U.S. 389, 394 (1933); *Screws v. United States*, 325 U.S. 91, 101 (1945) (plurality). Given the legislative history and purpose behind FCRA, and the starkly different circuit precedent interpreting § 616, the Ninth Circuit's adoption (and subsequent distortion) of the "reckless disregard" standard from the ADEA and FLSA contexts is at odds with this Court's repeated warnings against reflexively transferring the meaning of the term "willful" in one statute to a different statutory context. This Court should grant certiorari to resolve the proper meaning of the term "willful" in the distinct context of FCRA, as it has done in numerous other statutory contexts. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 131 (1988) (certiorari granted to resolve a circuit split on the meaning of "willful" in the FLSA); *Thurston*, 469 U.S. at 125 (certiorari granted to interpret the term "willful" in the ADEA); *Murdock*, 290 U.S. at 391-93 (certiorari granted to review whether court properly instructed jury on willfulness requirement under § 1114(a) of the Revenue Act of 1926 and § 146(a) of the Revenue Act of 1928); *Spies*, 317 U.S. at 493 (certiorari granted to review jury instruction on the term "willful" in § 145(a) of the Revenue Act of 1936).

II. THE QUESTION PRESENTED IS OF ENORMOUS PRACTICAL SIGNIFICANCE

The issue in this case is of great significance to businesses throughout the country that are subject to regulation under FCRA. In the context of this case alone, the Ninth Circuit's decision subjects insurance companies nationwide to potential statutory damages of up to $1,000, along with punitive damages and attorney's fees, for their failure to predict the Ninth Circuit's unprecedented hold-

ing that adverse-action notices must be sent to every initial purchaser of insurance who hypothetically could have received a lower premium but for information in their credit report. Since 2001, the insurance industry has issued more than 150 million new policies. *See* Brief for Amici Curiae the American Insurance Association *et al.* in Support of Defendants' Petitions for Rehearing En Banc at 15-16, Nos. 03-35695 & 04-35279 (9th Cir. filed Feb. 24, 2006). If even half of these policies were issued without a required notice, statutory damages alone could exceed $75 billion. *See id.* at 16 & n.7.[9] As noted above, FCRA, unlike other federal consumer protection statutes, puts no statutory cap on class-action damages.

Beyond the context of FCRA's adverse-action notice requirement, moreover, the Ninth Circuit's decision will subject American businesses to potentially enormous liability. As discussed above, FCRA regulates a wide range of companies in the field of consumer banking and finance, from "consumer credit agencies" (such as Experian, Trans Union, and Equifax), "furnishers of information" (including banks, credit card companies, mortgage companies, and consumer finance companies), and "users of information" (including not only credit and insurance companies, but also employers nationwide). If the decision below is allowed to stand, such businesses will be subject to civil liability, including statutory and punitive damages, in many cases where the requirements of FCRA have not been interpreted by any court and, as a result,

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[9] The adverse-action notice requirement affects far more than just insurance companies. FCRA's definition of "adverse action" makes clear that notices are required in a variety of contexts spanning a broad array of commercial transactions: extension of credit (15 U.S.C. § 1681a(k)(1)(A)), policies of insurance (*id.* § 1681a(k)(1)(B)(i)), employment decisions (*id.* § 1681a(k)(1)(B)(ii)), and granting of government licenses and benefits (*id.* § 1681a(k)(1)(B)(iii)). In addition, FCRA contains a "catch-all" provision broadly including any other "adverse" action "made in connection with an application" or "a transaction that was initiated by" a consumer. *Id.* § 1681a(k)(1)(B)(iv).

those businesses lack the *mens rea* required by Congress in § 616.

Although FCRA was passed more than 35 years ago, it has been amended several times in the last decade (*see supra* pp. 5-6), and courts continue to grapple with novel questions in interpreting its provisions. The case below addressed two issues that had not previously been addressed by any other court of appeals: (1) whether FCRA's notice requirement for "adverse actions" applies to initial policies of insurance; and (2) whether a company may be held liable for failure to issue an "adverse action" notice to a consumer when that company did not issue the relevant insurance policy. *See* Pet. App. 113a-117a, 122a-125a. On each question, the panel interpreted the substantive scope and requirements of FCRA for the first time. Moreover, even as it addressed these questions, the panel acknowledged that it was leaving unanswered another important and related question – namely, what specific information companies must include in any notice required by FCRA.[10]

Indeed, issues of first impression, as well as issues where courts are in conflict, are common under FCRA. For example, there is a split of authority as to whether the 1996 amendments to FCRA provide a private cause of action to consumers against furnishers of credit information. *See Sheffer v. Experian Info. Solutions, Inc.*, 249 F. Supp. 2d 560, 562 (E.D. Pa. 2003) (citing divided authorities). Issues pertaining to FCRA's substantive requirements also remain unresolved. For example, various Federal Trade Commission ("FTC") opinion letters suggest

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[10] In addition to erroneously expanding FCRA's notice requirement by holding that a required notice must, "at a minimum," "communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action," the decision below expressly left open the possibility that FCRA requires "a fuller description of what specific information was adverse." Pet. App. 121a & n.14.

that outside law firms that conduct internal investigations into the conduct of company employees on behalf of their corporate clients may qualify as "consumer reporting agencies," with all the attendant obligations under FCRA, *see, e.g.*, Letter from Robert Pitofsky, Chairman, FTC, to Rep. Pete Sessions (Mar. 31, 2000), *available at* http://www.ftc.gov/os/2000/03/ltrpitofskysessions.htm; Letter from Christopher W. Keller, FTC, to Judi A. Vail (Apr. 5, 1999), *available at* http://www.ftc.gov/os/statutes/fcra/vail.htm, while several district courts have questioned the persuasiveness of this broad interpretation. *See, e.g., Hartman v. Lisle Park Dist.*, 158 F. Supp. 2d 869, 875-77 (N.D. Ill. 2001); *Johnson v. Federal Express Corp.*, 147 F. Supp. 2d 1268, 1272 (M.D. Ala. 2001). Other issues abound.[11] On these and other unresolved questions, the Ninth Circuit's holding threatens to impose enormous liability on companies despite the fact that there has been no guidance from the courts as to FCRA's underlying requirements. And, in the class-action context, companies operating nationwide will now be held hostage to the Ninth Circuit's ruling even as to conduct occurring in circuits that have explicitly rejected that ruling. *See supra* note 5.

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[11] *See, e.g., Nunnally v. Equifax Info. Servs., LLC*, No. 05-12029, 2006 WL 1562100, at *3-*7 (11th Cir. June 9, 2006) (holding, as a matter of first impression, that a post-reinvestigation consumer report required by 15 U.S.C. § 1681i(a)(6)(B) does not require disclosure of the consumer's entire file and reversing the district court's contrary conclusion); *Matthiesen v. Banc One Mortgage Co.*, 173 F.3d 1242, 1244-45 (10th Cir. 1999) (holding, as a matter of first impression, that FCRA does not require a mortgage company to disclose to a mortgage applicant the fact that the denial of his application was based in part on information obtained from the applicant's tax returns); *DiGianni v. Stern's*, 26 F.3d 346, 348-49 (2d Cir. 1994) (per curiam) (resolving issue of first impression as to whether retail department stores are consumer reporting agencies); *Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1173-74 (5th Cir. 1993) (per curiam) (issue of first impression as to the definition of "consumer report").

The "reckless disregard" standard adopted by the Ninth Circuit will also invite intrusive inquiry into the decision-making processes of American businesses, and in particular into the legal advice given to those businesses by their counsel. According to the decision below, to rebut a finding of recklessness, companies will be required to set forth "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." Pet. App. 129a.

What is more, making such a showing may not even be enough under the Ninth Circuit's view. According to the decision below, even a reasonable effort to determine what the law requires may not be sufficient to avoid liability if a court later determines that the legal position taken by the company is "implausible." *Id.* at 129a. In virtually all cases, companies will thus be faced with the Hobson's choice of either divulging attorney-client privileged communications or forfeiting their intent-based defense under § 616, all without any guarantee that a showing of subjective good faith will successfully forestall liability.

In the end, the Ninth Circuit's relaxed standard for "willfulness" will impose enormous costs on businesses that are subject to FCRA's regulations. Under the Ninth Circuit's rule, companies in Safeco's position would have no choice but to take the most expansive possible interpretation of FCRA's requirements, resulting in enormous compliance costs, even where that interpretation is unlikely to be correct. Otherwise, companies would risk facing potentially enormous statutory damages, attorney's fees, and costs, as well as possible punitive damages, which would ensue under § 616 if they are mistaken.[12]

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[12] As the reported cases illustrate, the award of punitive damages and attorney's fees and costs often dwarfs the amount of actual damages. *See, e.g., Sheffer v. Experian Info. Solutions, Inc.*, 290 F. Supp. 2d 538, 553 (E.D. Pa. 2003) (award of $25,000 in attorney's fees and more than $7,500 in costs for claim valued at $1,000); *Bakker*, 152 F.3d at 1009 (affirming award of $500 in compensatory damages and $5,000 in punitive damages).

This Court should grant certiorari to clarify whether these serious and undesirable consequences are consistent with the definition of "willfulness" uniformly adopted by the other circuits.

There is no reason to postpone consideration of the proper interpretation of § 616 in this case. The issue is a pure question of law that will be unaffected by any proceedings on remand. Because it is undisputed that there was no contemporaneous judicial guidance interpreting "adverse action" to cover initial rates for insurance, and, further, that the Ninth Circuit's decision reversed prior district court decisions vindicating defendants' legal position, there can be no doubt that defendants' failure to provide notice was not a "knowing" or "purposeful" violation of law. *See Stevenson*, 987 F.2d at 296. Should the Ninth Circuit's interpretation of § 616's "willfulness" prerequisite be reversed, therefore, there would be no need for a remand. Nor would the harms to Safeco disappear if it ultimately persuaded the district court on remand that it did not act in "reckless disregard" of the law under the Ninth Circuit's adopted standard. As noted, the Ninth Circuit's approach forces defendants to assume that all FCRA cases will be brought under the Ninth Circuit standard and to undertake the significant expense necessary to accord their actions to the broadest possible understanding of that statute, even if that interpretation has not yet been adopted by any court. The Court should grant review to confirm, as all of the other courts of appeals have held, that "willful" violations of FCRA must be done with knowledge of the law's demands, and thereby to spare businesses throughout the country from the severe burden of incalculable punitive and statutory damages for failure to anticipate the later judicial resolution of issues of first impression.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 19, 2006

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35313

LORI SPANO, ET AL.,
Plaintiffs,
AND

CHARLES BURR, ET AL.,
Plaintiffs-Appellants,

v.

SAFECO CORPORATION, ET AL.,
Defendants-Appellees.

[Argued and Submitted Mar. 8, 2005]

[Decided Aug. 4, 2005]

MEMORANDUM*

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

Plaintiffs[1] appeal from the district court's grant of summary judgment to all defendants. First, with regard to SAFECO Insurance Company of Oregon, SAFECO Insurance Company of Illinois, and American States Insurance Company, the district court granted summary judgment on the ground that, under the Fair Credit Reporting Act

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1] We note that plaintiff Lori Spano is not a party to this appeal.

("FCRA"), in cases involving an initial policy of insurance a "single initial charge for the insurance coverage" cannot give rise to an "increase in any charge" under FCRA. In light of *Edo v. GEICO Casualty Co.*, No. 04-35279, we reverse that holding and remand. Second, with respect to SAFECO Insurance Company of America, the district court reasoned "only the entities that contracted with the Plaintiffs and issued their policies could deny, cancel, increase the charge for, or reduce or change the terms of Plaintiffs' insurance." Again we reverse in light of *Edo*. Third, defendants ask that we affirm on the alternative ground that their conduct was not willful under the Fair Credit Reporting Act. Again, defendants' arguments fail in light of *Edo*. Finally, the district court did not reach the issue of a statute of limitations bar to plaintiff Massey's claim. We remand that issue for consideration to the district court in the first instance.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 01-1464-BR

LORI SPANO, ET AL.,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant.

[Mar. 3, 2004]

AMENDED OPINION AND ORDER

BROWN, Judge.

This matter comes before the Court on Defendants' Motion for Summary Judgment (#144) and Motion to Strike Birnbaum Affidavit (#153). The Court heard oral argument on October 31, 2003.

For the following reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment on the claims of Plaintiffs Shannon Massey and Charles Burr and **DENIES** Defendants' Motion for Summary Judgment on the claims of Plaintiff Lori Spano. In addition, the Court **GRANTS** Defendants' Motion to Strike the Affidavit of Birny Birnbaum (#153).

PLAINTIFFS' CLAIMS

Plaintiffs Lori Spano, Shannon Massey, and Charles Burr brought this class action for themselves and on behalf of similarly situated individuals who allege they purchased personal lines of insurance from Defendants SAFECO Insurance Company of Oregon (SAFECO Ore-

gon), SAFECO Insurance Company of Illinois (SAFECO Illinois), and American States Insurance Company. Plaintiffs allege Defendants used information in consumer credit reports when underwriting or rating such insurance policies, took adverse actions against Plaintiffs and others based on such information, and failed to provide notice of their adverse action as required by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, *et seq.* Plaintiffs seek statutory damages, punitive damages, and attorneys' fees.

Defendants assert they took no adverse actions against the Plaintiffs within the meaning of FCRA. They also assert Plaintiffs fail to establish any willful violation of FCRA. Finally, Defendants maintain Plaintiff Massey's claim is barred by the applicable statute of limitations

FACTS

Unless otherwise noted, the following facts are taken from the parties' agreed on concise statements of fact.

Massey's Insurance Policy.

Massey purchased renters insurance from SAFECO Illinois on January 12, 2001. SAFECO Illinois has three tiers of renters insurance. The premium charged for the insurance depends on the tier in which the insured is placed. SAFECO Illinois used a consumer credit report in connection with the underwriting of Massey's policy. Because of her credit score, SAFECO Illinois placed Massey in a tier with a higher premium rate.

Burr's Insurance Policies.

Burr purchased an automobile insurance policy from American States Insurance Company on July 6, 2001. American States underwrote the policy through a program designed for higher-risk drivers and relied on information in a consumer credit report. Because Burr was placed in a higher-risk drivers insurance program, a high credit score would not have improved the premium rate offered to Burr. On September 5, 2001, and again on

November 28, 2001, American States cancelled Burr's insurance policy for nonpayment of premiums. American States did not consider a consumer credit report when it cancelled either policy. American States reinstated the policy following both cancellations, but the policy ultimately lapsed for nonpayment of premiums on July 7, 2002.

Burr purchased automobile insurance from SAFECO Oregon on October 22, 2002. SAFECO Oregon relied on information in a consumer credit report to set the amount of Burr's premium. SAFECO Oregon thereafter increased Burr's premium twice because of alleged unreported moving violations or accidents.[1]

Spano's Insurance Policies.

Spano purchased an automobile insurance policy from SAFECO National Insurance Company on March 27, 1997. On September 23, 1997, the policy was endorsed to SAFECO Illinois. On May 11, 2001, the policy was endorsed to SAFECO Oregon. After it was first issued, the policy was cancelled four times because Spano failed to pay the premium. Each time the policy was reinstated. Consumer credit reports were not used to underwrite, to renew, or to cancel the policy. On August 14, 2001, the policy was cancelled for a fifth time because Spano again failed to pay a premium. On August 29, 2001, Spano requested SAFECO Oregon to reinstate the policy. SAFECO Oregon, however, declined to reinstate the policy based in part on information contained in a consumer credit report.

SAFECO Oregon's practice is either to reinstate insurance coverage on the same terms as the cancelled policy or not to reinstate the coverage on any terms. If Spano had applied to SAFECO Oregon for other automobile insurance after the fifth cancellation, SAFECO Oregon would have taken a new application or updated the old one

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[1] Burr does not contend SAFECO Oregon violated FCRA when it increased Burr's premium due to alleged unreported moving violations or accidents.

with a new credit score, driving record report, and claims history.

FAIR CREDIT REPORTING ACT

FCRA requires consumer credit reporting agencies to adopt procedures for meeting the needs of business in a manner both fair and equitable to the consumer. *See* 15 U.S.C. § 1681(b). The purpose of FCRA is to protect consumers from the transmission of inaccurate information about them. *Guimond v. TransUnion Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995).

Under FCRA, a consumer reporting agency may furnish consumer reports "to a person which it has reason to believe intends to use the information in connection with the underwriting of insurance involving the consumer." 15 U.S.C. § 1681b(3)(C). FCRA requires the user of information provided by consumer reporting agencies, such as an insurer issuing an insurance policy to an insured, to satisfy certain responsibilities. 15 U.S.C. § 1681m(a) provides:

> If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall –
>
> (1) provide oral, written, or electronic notice of the adverse action to the consumer;
>
> (2) provide to the consumer orally, in writing, or electronically –
>
> > (A) the name, address, and telephone number of the consumer reporting agency . . . that furnished the report to the person; and
> >
> > (B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right –

> (A) to obtain . . . a free copy of a consumer report on the consumer from the consumer reporting agency . . . which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and
>
> (B) to dispute . . . with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

In connection with insurance, FCRA defines an "adverse action" to include:

> (i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance . . . .

15 U.S.C. § 1681a(k)(1)(B)(i).

DEFENDANTS' MOTION TO STRIKE BIRNBAUM'S AFFIDAVIT

In support of their Opposition to Defendants' Motion for Summary Judgment, Plaintiffs filed the Affidavit of proposed expert witness Birny Birnbaum. In *Rausch v. The Hartford Financial Services Group, Inc.*, CV 01-1529 (D. Or. Jul. 31, 2003), this Court concluded the contents of Birnbaum's Affidavit together with a second expert declaration were not the proper subjects of expert testimony:

> To the extent the declarations contain legal arguments or suggest interpretations of the plain meaning of FCRA, the Court concludes the proposed expert affidavits do not contain material that is the proper subject of expert testimony.

Op. and Order at 5. There is no material difference in Birnbaum's testimony in this case. Accordingly, the Court finds Birnbaum's Affidavit is not the proper subject expert

testimony, and the Court, therefore, has not considered that testimony in determining Defendants' Motion for Summary Judgment.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Standards

Summary Judgment.

Fed. R. Civ. P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e).

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Guidroz-Brault v. Mo. Pac. R.R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Hensley v. Northwest Permanente P.C. Ret. Plan & Trust*, 258 F.3d 986, 999 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 815 (2002). A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (citation omitted)

The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). If the

resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Arpin*, 261 F.3d at 919.

Statutory Construction.

When a district court interprets a federal statute, it must apply a two-part analysis. "The first and most important step in construing a statute is the statutory language itself." *Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001) (citing *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984)). The court must look to the text of the statute to "'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Accordingly, it is a "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)). A court, therefore, must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *Id.* (internal quotations and citations omitted).

If congressional intent is clear from the plain meaning of the statute, the court need not look further for guidance. *Id.* If a statute is unambiguous on its face, "there is ordinarily no reason to resort to legislative history to illuminate the language." *State of Cal. Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 853 (9th Cir. 2003). Courts look at legislative history when the plain language is unambiguous only if "the legislative history clearly indicates that Congress meant something other than what it said." *Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001), *cert. dismissed*, 535 U.S. 971 (2002)

(quoting *Perlman v. Catapult Entertainment, Inc.*, 165 F.3d 747, 753 (9th Cir.), *cert. dismissed*, 528 U.S. 924 (1999)). When the language of the statute is not dispositive, however, the courts look to the congressional intent revealed in the legislative history and "purposes of the statutory scheme." *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir.), *cert. denied*, 35 U.S. 1105 (2002).

In addition, if the statute is ambiguous as to the question at issue, the court must determine whether an agency interpretation of the statutory provision exists and is owed some degree of deference. *Brown & Williamson*, 529 U.S. at 132. When Congress expressly delegates authority or responsibility to an agency to implement a particular provision or to fill a particular gap in a statute, any ensuing regulation is binding on the courts unless it is procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). When it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," a reviewing court must accept the agency's interpretation as long as it is reasonable. *Id.* at 2172. The court, however, generally owes this degree of deference, commonly referred to as *Chevron* deference, only to formal agency interpretations such as those that follow notice-and-comment rulemakings or formal adjudications. *Id.* (*Chevron* deference is warranted only if the agency interpretation follows a "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."). *Id.* Nonetheless, the "well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance'" even if they do not have the force of law and are not entitled to *Chevron* deference. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)

(quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)). Such an agency interpretation is entitled to "a respect proportional to its 'power to persuade.'" *Mead*, 533 U.S. at 218 (quoting *Skidmore*, 323 U.S. at 140)

Discussion

Claims of Massey and Burr.

When Massey initially applied for renters insurance, SAFECO Illinois charged her a premium rate higher than the optimal rate available for renters insurance based on her consumer credit report. When Burr applied for automobile insurance, American States and SAFECO Oregon charged him premium rates higher than the optimal rates available for automobile insurance based on his consumer credit report.

In *Mark v. Valley Insurance Co.*, CV 01-1575-BR (D. Or. July 17, 2003), this Court granted summary judgment to the defendant insurance company on a similar claim based on substantially the same facts as those alleged in this case. *See* Op. and Order at 24 (issued July 10, 2003). In *Mark*, the defendant insurer charged Gustafson, one of the plaintiffs, a premium rate for automobile insurance higher than the optimal rate based in part on Gustafson's credit history as reflected in a consumer credit report. The defendant did not send Gustafson a notice of adverse action under FCRA. This Court stated:

> [T]he common and ordinary meaning of § 1681a(k)(1)(B)(i) is that an insurer takes an adverse action when it "makes greater," i.e., "increases," the price previously demanded of the insured for insurance. The Court also finds § 1681a(k)(1)(B)(i) reasonably cannot be read to mean an insurer takes adverse action if it initially charges an insured more than its optimal rate based on information in the insured's consumer credit report. The Court, therefore, concludes the statute unambiguously means an insurer does not increase a charge for insurance unless the insurer charges an insured one price for insurance and then subse-

> quently increases that charge based on information in the insured's consumer credit report. Accordingly, the Court concludes Valley Insurance did not increase the charge for Gustafson's car insurance because it issued a single charge for that insurance coverage.

Op. and Order at 24. Massey and Burr's circumstances are factually and legally indistinguishable from those of Gustafson. Like Gustafson, both Massey and Burr were quoted a higher premium rate on their initial applications for insurance based on information in consumer credit reports. In Burr's case, it happened on two occasions arising from his applications for two separate policies.

Accordingly, the Court concludes the analysis and holding in *Mark* also apply here: i.e., SAFECO Illinois did not increase the charge for Massey's renters insurance policy and American States and SAFECO Oregon did not increase the respective charges for Burr's automobile insurance policies because neither Massey nor Burr had existing policies with either of these Defendants at the time they applied for insurance. Each insurer, therefore, was offering a single initial charge for the insurance coverage. Accordingly, the Court concludes Defendants American States and SAFECO Oregon are entitled to summary judgment on the claims brought against them by Plaintiffs Massey and Burr.[2]

Spano's Claim.

Spano requested SAFECO Oregon to reinstate his previously cancelled policy. SAFECO Oregon declined to do so based on information contained in a consumer credit report. Spano asserts the denial of reinstatement of his previous insurance policy was a denial of his request for insurance and, therefore, constituted an "adverse action" under FCRA.

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[2] Because of the Court's ruling that no adverse action was taken against Massey, whether her claim is barred by the statute of limitations is moot.

SAFECO Oregon asserts Spano did not apply for new insurance when he requested reinstatement of his previously cancelled policy. If it reinstates a policy, SAFECO Oregon established it only reinstates that policy on the same terms as the cancelled policy. SAFECO Oregon asserts, therefore, a "request for reinstatement" of a previously cancelled policy is not the same as an "application for insurance." In addition, SAFECO Oregon contends Spano did not fill out a written application when he requested reinstatement of the previously cancelled policy and, therefore, Spano did not "apply" for insurance.

The Court disagrees. Under FCRA, an "adverse action" includes the denial of "any insurance, existing or applied for in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). Regardless of the form of request, Spano was seeking automobile insurance from SAFECO Oregon that did not exist at the time of Spano's request. FCRA does not differentiate between insurance provided in a new policy and insurance provided in a previously cancelled policy. In addition, the plain meaning of the word "apply" includes "requests" as well as "written applications" even though the word is used more commonly in the context of a written application. *See Merriam-Webster's Collegiate Dictionary* 57 (11th ed. 1998) ("apply: to make an appeal or request, esp. in the form of a written application"). Thus, when SAFECO Oregon denied Spano's request, it denied him insurance under the plain meaning of the statute.

Accordingly, the Court concludes SAFECO Oregon's rejection of Spano's request for reinstatement of his previously cancelled automobile insurance policy based in part on information in a consumer credit report was an adverse action that required SAFECO Oregon to give notice to Spano pursuant to the requirements of FCRA. The Court, therefore, holds Defendants are not entitled to summary judgment on Plaintiff Spano's claims.

CONCLUSION

For these reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment (#144) on the claims of Plaintiffs Massey and Burr and **DISMISSES** these claims **with prejudice**. The Court **DENIES** Defendants' Motion for Summary Judgment (#144) on the claims of Plaintiff Spano. In addition, the Court **GRANTS** Defendants' Motion to Strike the Affidavit of Birny Birnbaum (#153).

IT IS SO ORDERED.

DATED this 3rd day of March, 2004.

/s/ ANNA J. BROWN
ANNA J. BROWN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 01-1464-BR

LORI SPANO, ET AL.,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant.

[Apr. 21, 2003]

OPINION AND ORDER

BROWN, District Judge.

This matter comes before the Court on Defendant's Motion for Summary Judgment (# 76), Defendant's Motion to Strike the Affidavit of Birny Birnbaum (# 103), and Plaintiffs'[1] Motion for Leave to File a Second (*sic*)[2] Amended Complaint (# 123).

For the following reasons, the Court **GRANTS** Defendant's Motion for Summary Judgment and, therefore, **DISMISSES** Plaintiffs' claims against Defendant. The

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[1] As set out more fully below, Plaintiffs Joan Horton and Patricia McGrath and former Plaintiff Alan Opien voluntarily dismissed their claims in this action. In addition, all Plaintiffs dismissed their claims against Defendant SAFECO Corporation. The only claims that remain are the claims of Plaintiffs Lori Spano, Shannon Massey, and Charles Burr against Defendant SAFECO Insurance Company of America.

[2] Although Plaintiffs seek leave to file a "Second Amended Complaint," Plaintiffs already have filed three amended complaints. Accordingly, Plaintiffs actually seek leave to file a Fourth Amended Complaint.

Court also **DENIES as moot** Defendant's Motion to Strike the Affidavit of Birny Birnbaum.

In addition, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' Motion for Leave to File a Second (*sic*) Amended Complaint.

MOTION FOR SUMMARY JUDGMENT

In their Third Amended Complaint, Plaintiffs allege Defendant SAFECO Insurance Company of America (SAFECO-America) violated the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, when it took or participated in the taking of adverse action with respect to the underwriting of Plaintiffs' personal lines insurance policies on the basis of information contained in Plaintiffs' consumer reports and then failed to notify Plaintiffs of that adverse action.

SAFECO-America moves for summary judgment on Plaintiffs' claims on three grounds. First, SAFECO-America argues it could not have taken any adverse action with respect to the underwriting of Plaintiffs' insurance policies because SAFECO-America is not a party to any of the underlying insurance policies. SAFECO-America contends, in any event, no adverse action was taken with respect to any Plaintiffs. Finally, SAFECO-America asserts Plaintiffs cannot establish that SAFECO-America willfully failed to comply with its obligations under FCRA because this matter involves legal issues of first impression.

Factual Background

In their pleadings, the parties offer the Court little undisputed material to consider. SAFECO-America fails to explain clearly the relationships between itself and its affiliated companies or the way those entities operate with respect to the underwriting and rating of individual policies. SAFECO-America instead merely states Plaintiffs' understanding of the relationships between those entities is inaccurate.

On the other hand, few of the statements of fact enumerated by Plaintiffs are supported by evidence in the record. Plaintiffs attempt to define the relationships between the SAFECO entities by relying on SAFECO-America's answers to various discovery requests. Plaintiffs, however, defined SAFECO-America for purposes of the discovery requests to include SAFECO-America and all of its subsidiaries and affiliates. Thus, the discovery responses on which Plaintiffs primarily rely do not support Plaintiffs' contention that SAFECO-America rather than its affiliates or subsidiaries performed any particular acts.

Nonetheless, the Court discerns the following undisputed facts from this convoluted record:

SAFECO Corporation (SAFECO) is the parent corporation of a group of insurance companies that are collectively referred to as the SAFECO Property and Casualty Insurance Companies. SAFECO-America is a wholly-owned subsidiary of SAFECO and one of the SAFECO Property and Casualty Insurance Companies. SAFECO Insurance Company of Illinois (SAFECO-Illinois) and American States Insurance Company (American) are also wholly-owned subsidiaries of SAFECO. SAFECO Insurance Company of Oregon (SAFECO-Oregon) is a wholly-owned subsidiary of SAFECO-America.

The SAFECO Property and Casualty Insurance Companies are independent companies with separate boards of directors. Each company holds separate board meetings and keeps separate books and minutes of those meetings. The SAFECO Property and Casualty Insurance Companies, however, jointly employ personnel. Each of the joint employees may work for multiple SAFECO Property and Casualty Insurance Companies. When an employee does work for a particular member company, he is considered an employee of that member company at that time.

SAFECO-America and several of the SAFECO Property and Casualty Insurance Companies are parties to an

Intercompany Reinsurance Agreement (Agreement).[3] Pursuant to the Agreement, SAFECO-America agrees to accept and to reinsure all of the liabilities and expenses related to the insurance policies that the signatory SAFECO Property and Casualty Insurance Companies issued in consideration for the companies' promises to transfer to SAFECO-America all of the premiums and reserve accounts associated with those policies. The listed SAFECO Property and Casualty Insurance Companies also agree to reinsure all of SAFECO-America's liabilities and expenses related to insurance policies issued by or on its behalf in exchange for SAFECO-America's agreement to transfer to each of the signatory companies that company's respective share of SAFECO-America's premiums and reserves, including that company's share of the amounts reinsured by SAFECO-America under the Agreement. In addition, the signatory SAFECO Property and Casualty Insurance Companies authorized SAFECO-America to collect and to receive all premiums; "to take charge of," to adjust, and to pay all losses with respect to all of their insurance policies; and to "reinsure, administer or terminate" all such policies as appropriate. The signatory SAFECO Property and Casualty Insurance Companies also agreed to assign to SAFECO-America all of their companies' rights and interests in their agents' balances and uncollected premiums as well as any other underwriting assets and related liabilities. In turn, SAFECO-America agreed to transfer and to assign to each company its respective allocation of such underwriting assets and liabilities.

The Agreement specifically provides that each of the signatory SAFECO Property and Casualty Insurance Companies:

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[3] SAFECO-Illinois and American are parties to the Agreement. SAFECO-Oregon is not a party to the Agreement.

1. "has the ultimate veto right on its underwriting";

2. "has the ultimate right to cancel its risks"; and

3. "has the ultimate responsibility for and control of claims adjustment and claims payment and investment management."

Friel Aff., Ex. 8 at Art. XII. In addition, SAFECO-America agrees to hold the premiums and to pay the expenses of the signatory SAFECO Property and Casualty Insurance Companies "in a fiduciary capacity" only. The Agreement also explicitly provides the parties entered into the Agreement solely for the benefit of the insurers who are parties to the Agreement. Finally, the Agreement provides it "shall not create any right or legal relation whatsoever between the primary insured and any party to this Agreement other than the company issuing the original insurance to such insured."

Although the exact nature and extent of SAFECO-America's role in the formulation of the SAFECO Property and Casualty Insurance Companies' policies regarding the underwriting of insurance policies, the retrieval of consumer reports, and the dissemination of FCRA notices is unclear from the record, it is undisputed that SAFECO-America did not enter into any insurance contracts directly with Plaintiffs nor issue any insurance policies to Plaintiffs. In fact, Plaintiffs' insurance policies were issued by other members of the SAFECO Property and Casualty Insurance Companies. In particular, SAFECO National Insurance Company originally issued Plaintiff Spano's automobile insurance policy. The policy subsequently was endorsed to SAFECO-Illinois and later to SAFECO-Oregon. SAFECO-Illinois issued Plaintiff Massey's renter's insurance policy. American issued Plaintiff Burr's automobile insurance policy.

Standards

Fed.R.Civ.P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law.

The moving party must show the absence of an issue of material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir.2002). In response to a properly-supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir.2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Id.* A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir.1990). When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir.1998) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir.2000). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir.2001).

Discussion

15 U.S.C. § 1681m(a) requires a person who "takes adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" to provide notice of the adverse action to the consumer. In the insurance context, an adverse action means

> a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any in-

surance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i).

In *Razilov v. Nationwide Mut. Ins. Co.*,[4] this Court concluded FCRA only requires the person who actually takes the adverse action to notify the consumer. 242 F.Supp.2d at 991-92 (D.Or.2003). In addition, the Court held a person does not actually take adverse action if the person merely participates in the formulation of policies, guidelines, or standards that may lead to the taking of adverse action. *Id.* In *Ashby v. Farmers Group, Inc.*, this Court further held only an entity capable of changing the terms of an insurance contract with an insured can take adverse action under the plain meaning of § 1681m(a). 261 F.Supp.2d 1213, 2003 WL 21078356 (D.Or.2003). In other words, only a person who contracts with the insured and, therefore, accepts the risk and obligation to pay claims and acquires the corresponding right to set and to receive premiums from the insured can take an adverse action with respect to the insured. *Id.*

As noted, it is undisputed that SAFECO-America did not enter into any insurance contracts with Plaintiffs and did not issue any insurance policies to Plaintiffs. Plaintiffs, nonetheless, seem to argue the facts of this case are distinguishable from the facts of *Razilov* and *Ashby* because the SAFECO entities entered into a reinsurance agreement.

"Reinsurance is essentially the mechanism by which insurers protect themselves from financial disaster that could ensue if the risks that they have underwritten result in losses at a rate far in excess of that which was assumed when the risks were accepted." Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 9:1 (3d ed.2003). In other words, reinsurance allows an insurance company

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[4] Plaintiffs' counsel represent multiple Plaintiffs in eleven related putative class actions that involve alleged FCRA violations and that are currently pending in this Court.

to spread its risk to another company or to multiple companies. Such agreements, however, are between the primary insurer and its reinsurer(s) and create obligations and rights between those parties only. Reinsurance agreements do not alter the contractual relationship between the original insured and the insurer. *See id.* § 9:28 ("[I]t is widely recognized that the nature of reinsurance relationships does not render the reinsurer directly liable to the original insured.").

Although the Agreement at issue here contemplates SAFECO-America will collect the premiums, adjust the losses, and provide some degree of direction regarding the underwriting and rating of the signatory SAFECO Property and Casualty Companies' premiums, the Agreement unambiguously provides the ultimate control over and responsibility for underwriting and claims decisions lies with the individual insurers. The Agreement, therefore, did not change the relationships between Plaintiffs and their primary insurers. Notwithstanding the broad language in the Agreement to the contrary, only the entities that contracted with Plaintiffs and issued their policies could deny, cancel, increase the charge for, or reduce or change the terms of Plaintiffs' insurance. The Court, therefore, concludes Plaintiffs failed to show facts sufficient for a reasonable juror to conclude SAFECO-America took an adverse action against Plaintiffs. Accordingly, the Court concludes SAFECO-America is entitled to summary judgment as a matter of law and dismisses Plaintiffs' claims against SAFECO-America.[5]

MOTION TO STRIKE THE AFFIDAVIT OF BIRNY BIRNBAUM

SAFECO-America also moves to strike the Affidavit of Birny Birnbaum, which Plaintiffs filed in support of their

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[5] Because the Court concludes SAFECO-America is entitled to summary judgment on this ground, the Court will not address whether SAFECO-America would be entitled to summary judgment on the alternative grounds raised in SAFECO-America's Motion.

Memorandum in Opposition to SAFECO-America's Motion for Summary Judgment. In his Affidavit, Birnbaum primarily addresses issues other than whether SAFECO-America was an entity that took adverse action against Plaintiffs. Because the Court granted SAFECO-America's Motion for Summary Judgment on the ground that SAFECO-America did not take adverse actions against Plaintiffs, Birnbaum's testimony is now irrelevant for purposes of SAFECO-America's Motion. The Court, therefore, denies SAFECO-America's Motion to Strike as moot.

MOTION FOR LEAVE TO FILE SECOND (sic) AMENDED COMPLAINT

Procedural Background

On October 2, 2001, Plaintiff Lori Spano brought on her behalf and on behalf of all others similarly situated this purported class action against SAFECO for alleged violations of FCRA. In particular, Plaintiff Spano alleged SAFECO took adverse actions against her with respect to the underwriting of her automobile insurance as a result of information contained in her consumer report without notifying her as required under FCRA. On November 13, 2001, SAFECO filed its Answer, Defenses, and Affirmative Defenses to Plaintiff Spano's Complaint. SAFECO admitted its subsidiaries had used information contained in consumer reports when underwriting policies for automobile insurance. SAFECO, however, affirmatively pled it was not the "real party in interest" and Plaintiff Spano named the wrong party because

> SAFECO Corporation does not conduct or engage in any underwriting and does not issue insurance policies. SAFECO Corporation did not have any dealings with plaintiff, did not take any "adverse actions" toward plaintiff, and never issued an insurance policy to plaintiff.

Def.'s Ans., Def., and Affirmative Def. at 5.

On December 21, 2001, Plaintiff Spano filed a Motion for Leave to File a First Amended Complaint to add Alan Opien as a named plaintiff. In an Order dated January 8, 2002, the Court granted the Motion over SAFECO's objection. Plaintiffs Spano and Opien filed their First Amended Complaint the following day. SAFECO filed its Answer, Defenses, and Affirmative Defenses to the First Amended Complaint on January 24, 2002. Again, SAFECO asserted it was not the proper defendant because it did not issue any insurance policies to Plaintiffs Spano or Opien.

On June 4, 2002, Plaintiffs Spano and Opien filed a Motion for Leave to File a Second Amended Complaint. Plaintiffs Spano and Opien sought to do the following: 1) add two additional named plaintiffs, Shannon Massey and Joan Horton; 2) extend the class period back to January 2000 from September 2000; 3) add SAFECO-America as a defendant; and 4) add allegations to clarify that their claims relate to all personal lines of insurance rather than merely automobile insurance. On June 7, 2002, the Court dismissed Plaintiff Opien from this action pursuant to the stipulation of the parties. On July 9, 2002, the Court granted Plaintiff Spano leave to file the proposed Second Amended Complaint over SAFECO's objection. The Second Amended Complaint, however, named only SAFECO-America and did not name SAFECO as a party.

During a July 22, 2002, status conference with counsel, the Court granted the oral motion of Plaintiffs Spano, Massey, Horton, and Burr to add Patricia McGrath as an additional plaintiff and putative class representative. Plaintiffs filed their Third Amended Complaint against SAFECO-America on July 23, 2002. For the first time, Plaintiffs alleged SAFECO-America violated FCRA when it took "or participated in taking" adverse actions with respect to the underwriting of Plaintiffs' insurance policies.

On August 8, 2002, pursuant to a stipulation of the parties, the Court dismissed SAFECO from this action and

ordered the parties to use the caption as set forth on the first page of this Opinion and Order in all subsequent pleadings.

On that same day, SAFECO-America filed its Answer, Defenses, and Affirmative Defenses to the Third Amended Complaint. SAFECO-America admitted Plaintiffs entered into insurance contracts with its subsidiaries or affiliates. Although SAFECO-America generally denied taking or participating in the taking of adverse action with respect to the underwriting of Plaintiffs' insurance policies, SAFECO-America did not assert as an affirmative defense that it was not the real party in interest or that Plaintiffs had sued the wrong party.

On September 23, 2002, the parties filed a stipulated dismissal of Plaintiffs Horton and McGrath. On November 22, 2002, SAFECO-America filed a Motion for Summary Judgment with respect to the remaining claims of Plaintiffs Spano, Massey, and Burr on the ground that SAFECO-America, among other things, did not and could not have taken adverse action with respect to the underwriting of Plaintiffs' insurance policies because those underlying policies were solely between Plaintiffs and SAFECO-America's affiliates.

As noted, on January 21, 2003, the Court granted Nationwide Mutual Insurance Company's Motion for Summary Judgment in a related FCRA case, *Razilov v. Nationwide Mut. Ins. Co.*, 242 F.Supp.2d 977 (D.Or.2003). The Court held Nationwide did not take an adverse action for purposes of FCRA liability even though it established a decision-making process; provided consumer report information; and set the policies, guidelines, and standards that led to the taking of an adverse action. *Id.*, at 991-92. On February 20, 2003, this Court granted Farmers Group, Inc.'s Motion for Summary Judgment in another related FCRA matter, *Ashby v. Farmers Group, Inc.*, 261 F.Supp. 2d 1213, 2003 WL 21078356 (D.Or.2003). The Court extended its holding in *Razilov* and concluded only a person who contracts with an insured and, therefore, accepts

the risk and obligation to pay claims and acquires the corresponding right to set and to receive premiums from the insured can take an adverse action with respect to the insured. *Id.*

On March 3, 2003, Plaintiffs filed their current motion to amend. Plaintiffs move the Court for leave to amend their Third Amended Complaint to add claims against SAFECO-Illinois, SAFECO-Oregon, and American. In their Motion, Plaintiffs state they seek leave to amend in order to have these new claims relate back to October 2, 2001, the date that Plaintiff Spano filed the original Complaint in this matter.

On March 20, 2003, Plaintiffs filed a second putative class action against SAFECO-Illinois, SAFECO-Oregon, and American, CV 03-363-BR, for alleged violations of FCRA. Plaintiffs did not name SAFECO-America as a defendant in the new action.

Allegations in Plaintiffs' Proposed Second (sic) Amended Complaint

Plaintiffs Spano, Massey, and Burr attempt to bring this action on behalf of themselves and all other persons who purchased personal lines of insurance from SAFECO-Illinois, SAFECO-Oregon, and American "and their affiliates" from January 2000 to present. Plaintiffs allege SAFECO-Illinois, SAFECO-Oregon, and American took adverse action with respect to the underwriting of the insurance policies issued to Plaintiffs and all others similarly situated based on information contained in consumer reports. Plaintiffs further allege SAFECO-Illinois, SAFECO-Oregon, and American willfully failed to provide Plaintiffs and all others similarly situated with oral, written, or electronic notice of such adverse actions as required by 15 U.S.C. § 1681m(a). Plaintiffs seek an award of statutory damages, punitive damages, attorneys' fees, and costs on behalf of themselves and all other members of the class.

Standards

Fed.R.Civ.P. 15(a) provides a party may amend a pleading only by leave of court after a responsive pleading has been filed unless the opposing party consents to the amendment. Rule 15(a), however, also provides that leave to amend "shall be freely given when justice so requires." "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.2003). The Supreme Court has recognized several factors that a district court should consider when determining whether justice requires the court to grant leave to amend. Those factors include:

> undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment.

Id. at 1052 (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). The factor that carries the greatest weight is whether amendment will cause the opposing party prejudice. *Id.* "Absent prejudice or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Id.*

Discussion

SAFECO-America contends each of the *Foman* factors weighs against granting Plaintiffs leave to amend their Third Amended Complaint.

A. Undue Prejudice

As noted, whether an amendment will cause undue prejudice to the defendant is the key factor the court must consider when determining whether to grant a motion for leave to file an amended complaint. *Eminence Capital*, 316 F.3d at 1052. The party who opposes amendment bears the burden to show prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir.1987).

SAFECO-America contends it will suffer undue prejudice if the Court allows Plaintiffs to file a Fourth Amended Complaint because such an amendment would allow Plaintiffs to avoid an adverse summary judgment ruling. SAFECO-America also argues it will suffer undue prejudice if the Court grants Plaintiffs' Motion because it could be required to pay attorneys' fees incurred by Plaintiffs pursuant to the fee-shifting provision of FCRA if Plaintiffs eventually prevail on their claims.

15 U.S.C. § 1681n provides in part:

> Any person who willfully fails to comply with FCRA's requirements is liable to a consumer in an amount equal to the sum of . . . in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

The Court, however, has granted summary judgment to SAFECO-America as to all of Plaintiffs' claims against it. SAFECO-America, therefore, will not be required to pay the attorneys' fees incurred by Plaintiffs regardless of the viability of Plaintiffs' proposed claims against SAFECO-Illinois, SAFECO-Oregon, or American. Thus, the Court finds SAFECO-America has not suffered any prejudice, and its arguments regarding summary judgment and attorneys' fees are moot.

The Court, however, must consider whether granting Plaintiffs' motion to amend would cause undue prejudice to SAFECO-Illinois, SAFECO-Oregon, and American. *See DCD Programs*, 833 F.2d at 187 (the district court's "major objective" is to avoid prejudice to the party to be added in the proposed amended complaint). Pursuant to § 1681n, SAFECO-Illinois, SAFECO-Oregon, and American may be required to pay Plaintiffs' reasonable attorneys' fees if Plaintiffs eventually prevail on their FCRA claims. In that event, however, the parties may argue whether the attorneys' fees incurred by Plaintiffs in pursuit of their claims against SAFECO and SAFECO-America are "reasonable" attorneys' fees to be attributed

to SAFECO-Illinois, SAFECO-Oregon, and American pursuant to FCRA's fee-shifting provision. At that time, the Court can address whether Plaintiffs' alleged intentional, strategic decision prejudiced the proposed defendants.

SAFECO-America does not argue it or the proposed defendants will suffer any additional prejudice. SAFECO-America appears to concede that SAFECO-Illinois, SAFECO-Oregon, and American had adequate notice of this action. Plaintiffs' allegations against the proposed defendants are nearly identical to the allegations against SAFECO-America set out in Plaintiffs' Third Amended Complaint.[6] Moreover, SAFECO-America does not dispute Plaintiffs' contention that, no additional discovery will be required if the Court grants Plaintiffs' motion to amend. The Court previously determined it would set additional case management dates in this matter after it resolved SAFECO-America's Motion for Summary Judgment. If the proposed defendants wish to raise any additional issues of potential prejudice caused by Plaintiffs' delay in filing their motion to amend, the Court can address those issues when the Courts sets the case management schedule.

Based on this record, the Court finds neither SAFECO-America nor the proposed defendants, SAFECO-Illinois, SAFECO-Oregon, or American, will suffer undue prejudice if the Court grants Plaintiffs leave to file a Fourth Amended Complaint.

B. Bad Faith or Dilatory Motive

SAFECO-America argues Plaintiffs have exhibited bad faith by making an "eleventh-hour" request to add the proposed defendants after the failure of Plaintiffs' strategic decision to bring this action solely against SAFECO-America and not against the individual insurers who contracted with Plaintiffs and whose names appear on Plaintiffs' insurance policies. SAFECO-America speculates

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[6] Plaintiffs no longer allege participatory liability.

Plaintiffs initially chose to pursue only SAFECO-America in hopes of increasing the likelihood that the Court would certify a large national class and to avoid the need to locate additional class representatives.

Assuming for purposes of this Motion that Plaintiffs indeed made such a conscious strategic decision, the Court finds this fact does not support a finding that Plaintiffs filed the current motion in bad faith or for a dilatory purpose. Plaintiffs' allegations against SAFECO-Illinois, SAFECO-Oregon, and American are not frivolous on their face or in the context of the Court's decisions in the related FCRA actions, *Razilov* and *Ashby*. The parties apparently agree the addition of the proposed defendants will not cause any delay in the proceedings or require either SAFECO-America or the proposed defendants to incur expenses they otherwise would not be required to pay. The Court, therefore, concludes SAFECO-America has failed to show Plaintiffs' Motion was filed in bad faith or for a dilatory purpose.

C. Previous Amendments

The district court's discretion to deny leave to amend is "particularly broad" if the plaintiff previously has amended the complaint. *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir.1989). Thus, a court may deny leave to amend if the plaintiff has filed multiple pleadings and failed to cure pre-existing deficiencies. *Eminence Capital*, 316 F.3d at 1053. The Ninth Circuit, however, has implied the number of complaints previously filed carries less weight when the plaintiff adds a new theory or a new defendant to an action. *Id.* Under those circumstances, the court notes the plaintiff has not had multiple opportunities to cure known, pre-existing deficiencies in earlier versions of the complaint. *Id.*

Plaintiffs have amended the original Complaint three times. In each instance, Plaintiffs added additional class representatives. In addition, Plaintiffs substituted SAFECO-America for SAFECO after they discovered SAFECO-America's relationship with Plaintiffs' insurers.

Plaintiffs' Proposed Second (*sic*) Amended Complaint is the first pleading to include allegations against SAFECO-Illinois, SAFECO-Oregon, and American. As a result, Plaintiffs previously have not had the opportunity to cure deficiencies in the proposed amended complaint. The Court, therefore, concludes the fact that Plaintiffs previously amended the original Complaint on multiple occasions does not weigh in favor of denying Plaintiffs leave to file a Fourth Amended Complaint to add claims against the proposed defendants.

D. Futility

A proposed amendment to a complaint "'is futile only if no set of facts can be proved under the amendment . . . that would constitute a valid and sufficient claim.'" *Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1393 (9th Cir.1997) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir.1988)). A plaintiff should be afforded an opportunity to test his claim on the merits rather than on a motion to amend unless it appears beyond doubt that the proposed amended complaint would be dismissed for failure to state a claim under Fed.R.Civ.P. 12(b)(6). *Miller*, 845 F.2d at 214. *See also DCD Programs*, 833 F.2d at 188.

The Court has granted SAFECO-America's Motion for Summary Judgment on the ground that no reasonable juror could conclude from this record that SAFECO-America took adverse actions against Plaintiffs. Accordingly, Plaintiffs' Proposed Second (*sic*) Amended Complaint could not withstand a motion to dismiss with respect to Plaintiffs' claims against SAFECO-America. The Court, therefore, concludes it would be futile for the Court to grant Plaintiffs' Motion to amend with respect to Plaintiffs' allegations against SAFECO-America.

SAFECO-America also argues it would be futile to grant Plaintiffs' Motion with respect to their new claims against SAFECO-Illinois, SAFECO-Oregon, and American because the alternative grounds in SAFECO-America's Motion for Summary Judgment would also preclude claims

against the proposed defendants. SAFECO-America, therefore, "believes this Court should address these . . . [alternative grounds] before it permits any further amendments." The Court declines SAFECO-America's request to issue an advisory opinion on SAFECO-America's alternative grounds for summary judgment for the purpose of determining whether the proposed defendants later might succeed on the merits. Plaintiffs have alleged in their Proposed Second (*sic*) Amended Complaint that SAFECO-Illinois, SAFECO-Oregon, and American took adverse actions with respect to Plaintiffs based on information contained in their consumer reports and then willfully failed to notify Plaintiffs of those adverse actions. Plaintiffs' allegations are legally sufficient. Assuming the truth of those allegations for purposes of Plaintiffs' motion to amend, it is not beyond doubt that Plaintiffs can prove a set of facts in support of these claims. The Court, therefore, concludes SAFECO-America has not shown it would be futile for the Court to grant the Motion to amend with respect to the claims against SAFECO-Illinois, SAFECO-Oregon, and American.

In their motion to amend, Plaintiffs state they "seek to amend the complaint so the amended pleading will relate back to the original pleading for purposes of statute of limitations." Plaintiffs argue "relation back" is appropriate pursuant to Fed.R.Civ.P. 15(c) because the claims in the Proposed Second (*sic*) Amended Complaint arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original Complaint; the proposed defendants received notice of the institution of the action within the prescribed time; and the proposed defendants knew or should have known that, but for a mistake concerning the identity of the proper party, Plaintiffs would have brought the action against the proposed defendants. In SAFECO-America's Response, it contends Plaintiffs' new claims against SAFECO-Illinois, SAFECO-Oregon, and American should not relate back to the origi-

nal Complaint because Plaintiffs did not make a mistake of identity.

SAFECO-America, however, did not argue it would be futile for the Court to grant Plaintiffs' motion to amend because all or some of Plaintiffs' claims against the proposed defendants are barred by the applicable statute of limitations. Moreover, Plaintiffs have not filed a formal motion to have the Proposed Second (*sic*) Amended Complaint relate back to the original Complaint. In short, neither party has addressed 1) the applicable statute of limitations; 2) the extent to which some or all of Plaintiffs' claims might be barred by the applicable statute of limitations; 3) the dates of the alleged adverse actions; 4) whether Plaintiffs' previous amendments should relate back to the original Complaint; or 5) the proper standard for relating back in a purported class action. Because the issue is not squarely before the Court at this time and the parties have failed to brief the issue adequately, the Court cannot determine on this record whether Plaintiffs' claims against the proposed defendants relate back to the date of the original Complaint or whether it would be futile for the Court to grant Plaintiffs' Motion because all or part of Plaintiffs' proposed claims are barred by the statute of limitations.

E. Undue Delay

Plaintiff Spano initiated this action in October 2001. Plaintiffs knew early in the litigation that SAFECO-Illinois, SAFECO-Oregon, and American were the parties with whom Plaintiffs contracted for insurance. Plaintiffs, however, did not move to add those insurers as defendants until March 2003. Although seventeen months passed before Plaintiffs decided to pursue these claims, the Court has not set any deadlines in this matter. Discovery is not yet complete, and a trial date is not looming. The Court already has found neither SAFECO-America nor the proposed defendants will suffer undue prejudice as a result of the addition of these defendants at this stage in the litigation. Under these circumstances, the

Court finds Plaintiffs did not unduly delay asking the Court for permission to add the proposed defendants.

F. Weighing the Factors

The Ninth Circuit has held "delay, by itself, is insufficient to justify denial of leave to amend." *DCD Programs*, 833 F.2d at 186. The most important issue for the Court to determine is whether the existing defendant or the proposed defendants will suffer undue prejudice if the Court grants the motion to amend. The Court finds SAFECO-America has failed to show that it or its affiliates will suffer undue prejudice if the Court grants Plaintiffs leave to amend the Third Amended Complaint to add claims against SAFECO-Illinois, SAFECO-Oregon, and American. SAFECO-America also has failed to show it would be futile for the Court to grant Plaintiffs' motion to amend with respect to their claims against SAFECO-Illinois, SAFECO-Oregon, and American. Plaintiffs' proposed claims are not frivolous, and SAFECO-America has not shown Plaintiffs filed such claims in bad faith or for the purpose of delaying these proceedings.

Based on the foregoing, the Court grants Plaintiffs leave to amend their Third Amended Complaint to include claims against SAFECO-Illinois, SAFECO-Oregon, and American. The Court, however, concludes it would be futile for the Court to grant Plaintiffs' Motion with respect to Plaintiffs' claims against SAFECO-America as noted herein and, therefore, denies Plaintiffs' Motion to that extent.

CONCLUSION

For these reasons, the Court **GRANTS** Defendant's Motion for Summary Judgment (# 76) and, therefore, **DISMISSES** Plaintiffs' claims against Defendant. The Court also **DENIES as moot** Defendant's Motion to Strike the Affidavit of Birny Birnbaum (# 103).

In addition, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' Motion for Leave to File a Second (*sic*) Amended Complaint (# 123). Plaintiffs shall caption the

new pleading "Fourth Amended Complaint"; delete all previous or proposed allegaticns regarding Plaintiffs' claims against SAFECO-America; add the proposed allegations regarding Plaintiffs' claims against SAFECO-Illinois, SAFECO-Oregon, and American; and otherwise ensure the Fourth Amended Complaint is consistent with this Opinion and Order. Plaintiffs shall file their Fourth Amended Complaint no later than April 29, 2003.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35313

[D.C. No. CV-01-01464-AJB
District of Oregon, Portland]

LORI SPANO, ET AL.,
Plaintiffs,

AND

CHARLES BURR, ET AL.,
Plaintiffs-Appellants,

v.

SAFECO CORPORATION, ET AL.,
Defendants-Appellees.

[Filed Apr. 20, 2006]

ORDER

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

The panel has voted unanimously to deny Appellees' petition for rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and rehearing en banc is denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-35695 & 04-35279

JASON RAY REYNOLDS, ET AL.,
Plaintiffs-Appellants,

V.

HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL.,
Defendants-Appellees,

AJENE EDO,
Plaintiff-Appellant,

V.

GEICO CASUALTY COMPANY,
Defendant,

AND

GEICO GENERAL INSURANCE COMPANY, ET AL.,
Defendants-Appellees.

[Argued and Submitted Mar. 8, 2005]

[Filed Aug. 4, 2005]

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

REINHARDT, Circuit Judge:

Under the Fair Credit Reporting Act ("FCRA"), insurance companies are required to send adverse action notices to consumers whenever they increase the rates for insurance on the basis of information contained in consumer credit reports. 15 U.S.C. §§ 1681a(k)(1)(B)(i).

1681m(a).[1] The principal question before us is straightforward: Does FCRA's adverse action notice requirement apply to the rate first charged in an initial policy of insurance? We hold that the answer is yes: The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate.

We also resolve five ancillary questions. First, we hold that FCRA's adverse action notice requirement applies whenever a consumer would have received a lower rate for insurance had his credit information been more favorable, regardless of whether his credit rating is above or below average. Specifically, the requirement covers those whose credit information is disregarded and replaced for purposes of a rate computation by an average or neutral credit figure, so long as the insurance rates would have been lower had the credit information been more favorable. Second, we hold that charging more for insurance on the basis of a transmission stating that no credit information or insufficient credit information is available constitutes an adverse action based on information in a consumer report and therefore requires the giving of notice under FCRA. Third, we hold that, to comply with FCRA's notice requirement, a company must, *inter alia*, communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.

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[1] Section 1681m(a) provides that any person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide "notice of the adverse action to the consumer." Section 1681a(k)(1)(B)(i) defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

Fourth, we hold that when a consumer applies for insurance with a family of companies and is charged a higher rate for insurance because of his credit report, two or more companies within that family may be jointly and severally liable. The notice requirement applies to any company that makes a decision that a higher rate shall be imposed, issues a policy at a higher rate, or refuses to provide a policy at a lower rate, if the company's action is based in whole or in part on the consumer's credit information.[2] Finally, we adopt the Third Circuit's definition of "willfully," as that term is employed in FCRA, and hold that a company is liable for a willful violation of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir.1996) (as amended)). Like the Third Circuit, we hold that conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Id.* at 227.

I. THE ACT AND THE APPEALS

The Fair Credit Reporting Act seeks to ensure the "[a]ccuracy and fairness of credit reporting" through a variety of means. 15 U.S.C. § 1681. Central to this goal, FCRA limits the persons who may obtain consumer credit reports and requires users of such reports to notify consumers when, in reliance on a consumer report, "adverse action" has been taken. 15 U.S.C. §§ 1681a, 1681b, 1681m. Specifically, § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer." Adverse action notices advise consumers that an adverse action has been taken against them, and the nature of that ac-

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[2] We do not intend this list to be exhaustive.

tion, and alerts them that they may view a copy of the consumer report that triggered the adverse action free of charge and correct any errors affecting their economic well-being. Even if reports are free from error, adverse action notices give consumers important information about how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future.

To resolve the various issues that have arisen regarding FCRA's notice of adverse action requirement in a set of related cases, we have consolidated two appeals for purposes of this opinion: *Reynolds v. Hartford Financial Services Group, Inc.*, No. 03-35695 and *Edo v. GEICO Casualty Co.*, No. 04-35279. *Reynolds* presents the principal issue: May a rate first charged in an initial policy of insurance constitute an increased rate for purposes of the FCRA adverse action notice requirement? Hartford Fire asserts that a rate cannot qualify as increased unless a lower rate has previously been charged to the customer. *Reynolds* also presents the issues whether a communication stating that no credit information or insufficient credit information is available constitutes a "consumer report" under the statute and whether an adverse action notice that does not tell the consumer that an adverse action has been taken against him, describe that action and its effect upon the consumer, and identify the parties taking the action is sufficient under FCRA. *Edo* presents the issue whether an adverse action occurs whenever a consumer would have received a lower rate if his credit information had been more favorable; or whether an insurance company's practice of providing an adverse action notice only if the consumer's credit information is below average (or "neutral") and that factor results in the imposition of a higher rate than if his credit rating had been average, is consistent with FCRA. Both *Edo* and *Reynolds* also require us to decide which companies are liable under FCRA for the failure to give notice of an increased rate when several affiliated companies are involved in the process of rate-setting and policy issuance. Finally, de-

fendants in both cases seek summary judgment on the alternative ground that their actions were not willful as a matter of law. To address this last contention, we must define the meaning of the term "willfully" as it applies in FCRA.

A. Reynolds v. Hartford Financial Services Group, Inc.

Jason Reynolds is the sole remaining named-plaintiff in this class action against Hartford Fire Insurance Company ("Hartford Fire").[3] He seeks statutory and punitive damages, as well as reasonable attorneys fees for the company's violation of FCRA's adverse action notice requirement. Reynolds' claims relate to two insurance policies he obtained, one for automobile and the other for homeowners insurance. On the record before us, Hartford Fire set the rates to be charged for both policies. Hartford Property and Casualty Insurance Company of Hartford ("PCIC Hartford") issued Reynolds the homeowners insurance policy and Hartford Insurance Company of the Midwest ("Hartford Midwest") issued him the automobile insurance policy. We refer to Hartford Fire, Hartford PCIC, and Hartford Midwest as the "Hartford Companies."

Reynolds originally sued Hartford Fire and later sought to amend his complaint to add PCIC Hartford and Hartford Midwest.[4] Hartford Fire sought summary judgment, which the district court granted on two grounds. First, it held that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Second, and in the alternative, it held that an insurance company that issues a policy to a new policy-holder "cannot [be held to] 'increase' a charge

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[3] Rausch is no longer pursuing his appeal.

[4] Reynolds also named Hartford Financial Services Group, Inc., which serves as a holding company, but is not pursuing his claims against that entity.

for insurance unless the insurer makes an initial demand for payment of the insured and subsequently increases the amount of that demand based on information in the insured's credit report." The second and alternative holding relies on a previous decision by the same court, *Mark v. Valley Insurance Co.*, 275 F.Supp.2d 1307, 1317 (D.Or.2003). On the basis of that earlier decision, the district court also denied Reynolds leave to amend, reasoning that he could not "state viable FCRA claims against the proposed defendants," PCIC Hartford and Hartford Midwest. In other words, leave was denied on the ground that the policies were initial issues and no previous charge had been made to the customer at a lower rate.

The Hartford Companies' Use of Credit Information

During the relevant time period, Hartford Fire and the American Association of Retired Persons ("AARP") had an agreement under which Hartford Fire or one of its subsidiaries would issue automobile and homeowners insurance to AARP members at a premium rate if those individuals enjoyed favorable credit ratings. While the procedures used for issuing the two kinds of insurance varied slightly, they were the same in most relevant respects. In both cases, employees of Hartford Fire would make all of the decisions concerning AARP members' insurance policies for all of its subsidiaries, including Hartford Midwest, which issued automobile insurance, and PCIC Hartford, which issued homeowners insurance. In doing so, Hartford Fire's employees would obtain credit information from Trans Union, a consumer information bureau, through a contract to which Hartford Fire and Trans Union were signatories. This information would be conveyed to Hartford Fire through the risk assessment and data supply firm, ChoicePoint, in the form of an "insurance score." High insurance scores correlated with more favorable credit reports. With regard to automobile insurance, if an AARP member had a high enough insurance score, he would qualify for a ten percent discount. With regard to homeowners insurance, only if the member obtained a

top insurance score could be assigned to the top tier of insurance with the best rate.

If, when Hartford Fire sent a request for an insurance score, no credit information matched the name and address of the consumer or if the information that did match was insufficient to generate an insurance score, this information would be transmitted to the company, and the consumer would be labeled a "no hit" or a "no score" and would not be assigned an insurance score. Without an insurance score, the consumer could not qualify for the ten percent discount with Hartford Midwest, nor could he be placed in the top insurance tier with PCIC Hartford. As a result, a "no hit" or "no score" consumer would in numerous instances pay more for insurance than if he had received a high insurance score.[5]

The Hartford Companies' Adverse Action Policy

Hartford Fire is the only one of the Hartford Companies to have developed or sent adverse action notices. The parties dispute whether Hartford Fire actually sent an adverse action notice to Reynolds, but that is a question of fact for the fact-finder. Whether the notice Hartford Fire contends it sent was adequate under FCRA is a question of law that we discuss below.

Reynolds' Insurance Policies

Reynolds applied for both automobile and homeowners insurance by contacting the Hartford Companies. He had no existing policy with that group. An employee of Hartford Fire collected personal information and attempted to obtain Reynold's insurance score twice, once for each in-

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[5] In connection with Reynolds' request for automobile insurance, he was labeled a "no hit" because his name and address did not match any person's in the national database. In connection with his homeowners insurance request, he was labeled a "no score" because, while his name and address did call up information in the database, the information was insufficient to generate an insurance score. As both a label of "no hit" and "no score" have the same practical effect, for convenience's sake we will hereafter refer in this opinion to a report in either category as a "no hit."

surance application. The credit bureau reported both times that Reynolds was a "no hit." *See* n.5, *supra*. Although Hartford Midwest issued him an automobile insurance policy and Hartford PCIC issued him a homeowners insurance policy, as a result of his "no hit" status Reynolds did not receive either of the AARP premium rates.

B. Edo v. GEICO Casualty Co.

The second of the consolidated cases relates to an automobile insurance policy obtained by Ajene Edo. Like Reynolds, Edo seeks statutory and punitive damages, as well as reasonable attorney fees, on behalf of a class of consumers for violation of FCRA's adverse action notice requirement. He, too, is the sole remaining named-plaintiff. Edo appeals the district court's grant of summary judgment to defendants Government Employees Insurance Company ("Government Employees"), GEICO General Insurance Company ("GEICO General"), and GEICO Indemnity Corporation ("GEICO Indemnity").[6] These are affiliated companies, all of which are subsidiaries of the GEICO Corporation and are referred to collectively by the parties as the "GEICO Companies." We sometimes refer to that group of companies by that designation and sometimes simply as GEICO.

Unlike Hartford Fire, the GEICO Companies concede that adverse actions can occur with respect to the first rates charged in an initial policy of insurance. They do not assert that in order for an adverse action to occur there must be an increase to a rate that the consumer has previously been charged. Nevertheless, the district court granted summary judgment with respect to the various GEICO entities on a number of different grounds. First, the court held that Edo did not have standing to bring a

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[6] Edo is not pursuing his appeal against GEICO Casualty Corporation ("GEICO Casualty"), a company that writes insurance policies for high risk consumers and charges the highest rates. GEICO Casualty did not issue a policy of insurance to Edo, and Edo did not seek to obtain a policy at the unfavorable rates the company charged.

FCRA claim against Government Employees because he "was not eligible for insurance coverage from [that company] regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel." Next, it granted summary judgment in favor of GEICO General because that company "did not contract with Plaintiff to issue or to underwrite an insurance policy." This ruling was in accord with the district court's previous holdings in other related cases that only the company that issues the insurance policy can be held to have taken an adverse action under FCRA. *See Ashby v. Farmers Group, Inc.*, 261 F.Supp.2d 1213, 1222 (D.Or.2003); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F.Supp.2d 977, 989-90 (D.Or.2003). Finally, it granted summary judgment to GEICO Indemnity because "the premium charged to [Edo] by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."

GEICO's Use of Credit Information

The GEICO Companies are organized by risk. GEICO General provides preferred policies with low rates for those who are lesser insurance risks. Government Employees also provides preferred policies, but only to government employees. GEICO Indemnity issues standard policies with mid-level rates for moderate risk consumers. Finally, GEICO Casualty issues non-standard policies with high rates for those who are greater risks. The GEICO Companies began using consumer credit reports in early 1999.

In order to purchase insurance, consumers call a toll-free number and talk to a GEICO sales counselor. The sales counselor is employed by Government Employees but works on behalf of all of the GEICO Companies. Indeed, all of the work of the GEICO Companies is performed by Government Employees workers, as the other companies do not have any employees. Upon learning that a customer wishes to purchase automobile insurance, the sales counselor elicits basic information and asks

whether he may use the customer's credit information when arranging for his policy. If the customer acquiesces, the sales counselor obtains the credit information in the form of an insurance score calculated by the data analysis firm Fair Isaacs from information supplied by Trans Union. Government Employees is the only GEICO company that has a contract with Trans Union and Fair Isaacs to provide this information. Using a Government Employees computer system, the sales counselor converts the insurance score to a credit weight and combines it with other weights assigned to other insurance factors, such as age and number of accidents to arrive at a final total insurance weight. Based on that final weight, the sales counselor assigns the customer to one of the GEICO Companies and determines the appropriate insurance tier. This determination serves to establish the rate the consumer will be charged. After the information the customer has provided has been verified, he is issued an insurance policy at that rate.

GEICO's Adverse Action Policy

The GEICO Companies' original FCRA policy, adopted in 1999, was to send adverse action notices to all consumers whose credit reports were used in making insurance decisions. Later that same year, GEICO changed its policy, at least in part to reduce costs. Instead of sending adverse action notices to everyone, GEICO developed a system for determining which actions it deemed adverse by comparing the rate charged to the rate that it would have charged had the credit information been "neutral."

GEICO's new system, however, did not comply with FCRA's requirements. The GEICO Companies' policy during the period relevant to this case was to compare the consumer's actual company and tier placement (which, as described above, was based in part on his credit rating) with the company and tier to which he would have been assigned had a "neutral" credit weight been substituted for his actual credit weight when calculating the final total insurance weight. The GEICO Companies' "neutral" credit weight was defined, generally speaking, as the

weight that reflected the average credit rating of all consumers. The GEICO Companies would calculate two final total insurance weights, using only one variable – the actual credit weight in one case, and the "neutral" credit weight in the other. Only if the final total insurance weight using the "neutral" credit weight would have resulted in the consumer's placement with a different company or in a different tier than that to which the consumer was actually assigned, and only if such different placement would have resulted in the consumer's being charged a lower rate, would GEICO Companies issue an adverse action notice. In other words, the GEICO Companies' policy was to refrain from sending a statutory notice if use of the consumer's actual credit information caused the applicant to be placed with an entity and in a tier that resulted in the charging of the same or a lower rate than the rate that he would have been charged had the calculation and the ensuing assignment been based on a "neutral" or average credit rating. Under this policy, even if the rate ultimately charged was higher than the rate to which the consumer would have been entitled had he had a more favorable credit rating, the statutory notice was not sent if use of the "neutral" and the actual credit data would have led to an assignment to the same entity and tier. Thus, it was not GEICO's policy to send adverse action notices to all consumers who would have been charged lower rates had they enjoyed a more favorable credit rating.

Edo's Insurance Application

Following Edo's call to GEICO's toll-free number, the sales counselor used the credit information he obtained to place its new customer with GEICO Indemnity. The GEICO Companies then applied its policy for determining whether an adverse action had occurred. GEICO calculated that, had the neutral credit weight been used instead of Edo's actual credit weight, the resulting final total weight would still have resulted in Edo's being placed with GEICO Indemnity. That Edo's placement, and the rate charged for his insurance, did not improve when the

"neutral" weight was used is not surprising, as Edo's actual credit weight was better than average. Under its policy, however, the GEICO Companies did not issue him an adverse action notice.

It is uncontested that if the GEICO Companies had used the highest credit weight that a consumer could receive rather than the neutral credit rate to determine Edo's alternate placement, GEICO would have placed Edo with GEICO General, a preferred company, and offered him a lower insurance rate. In short, if Edo's credit information had been more favorable (even though it was already above average), he would have been charged less for his insurance. In 2002, the GEICO Companies changed its policy and began to issue adverse action notices whenever a report with more favorable credit information would have resulted in a lower insurance rate. Under the new policy, Edo would have received the statutory notice.

II. ANALYSIS

A. Initial Policies of Insurance

The principal question in this and a number of related cases[7] constitutes a matter of first impression: Does FCRA's adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an increase in a rate that the consumer has previously been charged? As with all statutory interpretation, we begin with the text of the statute. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). An adverse action with respect to insurance is defined by 15 U.S.C. § 1681a(k)(1)(B)(i) as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

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[7] The related cases are resolved by memoranda of disposition filed concurrently herewith.

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford, refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor – such as adverse credit information, age, or driving record[8] – regardless of whether the customer was previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

"Increase" means to make something greater. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed.1988) (defining "increase"

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[8] An adverse action under FCRA can, of course, only occur if the increase in charge was due to "information contained in a consumer report." 15 U.S.C. § 1681m(a). The consumer reports at issue in these cases are credit reports. While increases in charges may occur because of many factors, plaintiffs contest only the increases due to unfavorable credit information.

as "growth, enlargement, etc[.]"). "Charge" means the price demanded for goods or services. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers [the Truth in Lending Act's] disclosure requirements." *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir.2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

Second, the statutory definition of "adverse action," as it is made applicable to insurance, explicitly encompasses "*any* insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Congress' use of the latter phrase demonstrates its intent that "adverse actions" apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy. The text of the statute does not permit the imposition of any temporal limitation. Hartford has suggested no sensible alternative reading of "existing or applied for." Thus, reading the terms "increase" and "charge" in the context of the provision as a whole, particularly the "existing or applied for" phrase, supports affording them their ordinary meaning.

Third, our interpretation of the terms at issue best comports with the stated purpose of FCRA: to ensure the "[a]ccuracy and fairness of credit reporting." 15 U.S.C. § 1681. FCRA's adverse action notice requirement is an important tool that Congress created, using broad, encompassing language. Through this requirement, Congress sought to promote the rights of consumers by giving them essential information about how their credit report is used, information that they could obtain in no other way. The information Congress mandated serves two important ends. First and foremost, once consumers possess this information they can check and correct any errors in their credit reports. This increases the chances that a consumer's financial stability will not be hampered by faulty credit information. It also improves the overall accuracy of credit reports, which facilitates the operation of our markets. Second, even when credit reports are accurate, informing consumers when their credit rating is hurting them in the marketplace gives them important information about the benefits of improving their credit rating in the future and may even assist them in learning how to do so.

Hartford Fire's contention that FCRA does not apply to the rate charged in initial insurance policies would seriously undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir.1995). While our interpretation is the plain one, this canon supports our result.

We hold that whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased

the charge within the meaning of FCRA. Therefore, the fact that Reynolds' policy was an initial one, and his rate was the initial rate charged, is of no consequence. Reynolds' rate was increased above that which it would have otherwise been because of his credit report. As the statute's text is clear, we need not resort to either the agency's interpretations[9] or the statute's legislative history. The district court erred in granting summary judgment to Hartford Fire on the ground that FCRA does not apply to the rate first charged in an initial policy.[10]

B. What Constitutes An Adverse Action

The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more

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[9] We note that our holding is consistent with the Federal Trade Commission's interpretation of the statute. Because we find FCRA unambiguous, however, we reach our decision independently of, and do not defer to, the agency's interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[10] Although our discussion has principally related to initial insurance policies, our interpretation of "increase in any charge" is obviously not limited to a consumer's first policy. As we have explained, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price. This definition applies equally to initial issues, amendments, and renewals of insurance policies.

favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.

FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him.[11] Such is the case with Edo. Because Edo would have been placed with GEICO General instead of GEICO Indemnity and thus would have been charged a lower rate if his credit rating had been higher, an adverse action occurred and an adverse action notice was required under FCRA.[12] Under the GEICO formula, the fact that the credit rating Edo

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[11] We note that the statute does not require an insurance company to issue an adverse action notice simply because a consumer does not get the best possible rate. If a better credit report would not have reduced the consumer's insurance rate, his credit report is not the cause of the higher price and therefore no adverse action based on a credit report has occurred.

[12] Making a slightly different argument, at least rhetorically, the GEICO Companies also argue that the action they took against Edo was not adverse because he was placed in the same company that he would have been placed in had his credit information not been used. While this is a true statement, it is only so because if the consumer refuses to allow his credit information to be used, the sales counselor assigns the consumer the "neutral" credit weight. Therefore, the GEICO Companies' argument that the action was not adverse because it was the same as if no credit information had been used is functionally identical to its argument that the action was not adverse because it was not detrimental when compared to the result using a "neutral" credit rating. Thus, this argument fails as well.

actually received was higher than the average rating did not mean that Edo would not be charged a higher rate than he would have been charged had he had an even better credit report, but it ensured that he would not receive an adverse action notice when he was charged that increased rate. The district court erred in granting GEICO Indemnity summary judgment on the ground that Edo's rate was not increased on the basis of his credit report.

C. "No Hit" Adverse Actions

Hartford Fire makes a separate argument as to why in Reynolds' case no adverse action was taken. Specifically, the company argues that no adverse action was taken against Reynolds "based in whole or in part on any information contained in a consumer report" within the meaning of 15 U.S.C. § 1681m(a). When Hartford Fire requested credit information about Reynolds, Trans Union did not possess the necessary information to generate an insurance score and transmitted this finding to the insurer. Reynolds was therefore considered a "no hit." *See* n.5, *supra*. Because he was so designated, Reynolds was rendered ineligible for the premium rates available to AARP members with qualifying credit ratings, and, as a result, was charged a higher rate in his initial policies. Hartford Fire argues, however, that these were not adverse actions because, it contends, an "adverse action" occurs only if it is based on "information contained in a consumer report" and no such report was received with respect to Reynolds. We reject Hartford Fire's argument.

FCRA's definition of "consumer report" is broad. It unquestionably encompasses a credit reporting agency's communication to an insurance company that a consumer does not have enough information on file for an insurance score to be calculated. Specifically, 15 U.S.C. § 1681a(d)(1) explains that "[t]he term 'consumer report' means any written, oral, or other communication of *any information* by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . ." (emphasis added).

Reporting that an agency cannot obtain any information regarding a consumer or that a consumer has insufficient credit information on file conveys a message regarding the consumer's creditworthiness, standing, and capacity that makes his obtaining of credit far more difficult. Such a report suggests that the consumer cannot show that he pays debts in a timely manner. That information may be false: The credit agency may have used the wrong name or searched the wrong records, missing data that would have shown that the applicant is indeed creditworthy. Providing notice therefore serves the statutory purpose of allowing the consumer to correct errors in credit reports. Accordingly, we hold that a communication that a consumer has no information available or an insufficient credit history to permit the calculation of a credit rating qualifies as "a consumer report" within the meaning of FCRA. Because it is uncontested that Reynolds would have been charged lower insurance rates had he received qualifying credit ratings and because the application of the "no hit" rule precluded him from receiving such ratings, we hold that an adverse action was taken against him on the basis of information contained in a credit report. Accordingly, the district court's order of summary judgment may not be affirmed on the ground that its actions with respect to Reynolds were not based on such information.

D. Adequacy Of The Notice

Hartford Fire also urges us to affirm the district court's grant of summary judgment on the alternative ground that, although (in its view) it was not required under FCRA to send adverse action notices, the notices that the Hartford Companies did send were sufficient to meet its FCRA responsibilities. We reject this argument because the notices were inadequate as a matter of law. Under 15 U.S.C. § 1681m(a)(1), a company that takes adverse action on the basis of a consumer report must "provide oral, written, or electronic notice of the adverse action to the consumer" as well as meet a number of other specific

requirements.[13] While the term "notice of an adverse action" is not defined in the statute, we hold that, at a minimum, such a notice must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.[14] *See Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir.1983) (requiring disclosure of "reliance on data contained in [a consumer's] credit report" when providing notice of an adverse action).

The notices Reynolds received did not comply with any of the above requirements. They did not tell him that any adverse action had been taken against him. They simply stated that "[t]he Hartford's eligibility and pricing decisions are based in part on consumer report(s) from a consumer reporting agency" and allowed him to make a written request in order to find out more. Reynolds was entitled to be informed that his rate for insurance was increased because of information in his credit report. He was also entitled to be told that Hartford Fire made the pricing decision and that Hartford PCIC and Hartford Midwest issued him policies at those higher rates. FCRA recognizes the difference between telling a consumer that his credit information *could* affect his insurance rate and that it *did* adversely affect his rate, and requires notice of the latter. We therefore reject Hartford Fire's alternative argument for upholding the district court's order.

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[13] The notice must also contain information regarding the consumer reporting agency. It must provide the name, address, and telephone number of the agency that provided the report, a statement that the agency did not make the adverse decision and is not able to explain it to the consumer, a statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the agency, and a statement setting forth the consumer's right to dispute directly with the agency the accuracy or completeness of any information in the report. *See* 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. § 698, App. H.

[14] We do not decide whether a fuller description of what specific information was adverse is required as this question is not before us.

E. Who Is Liable

The defendants all contend that only one company can be liable when an insurance policy contains an increase in rates – the issuing company. The plain text of the statute, as well as its purposes, are to the contrary. Here, we hold that all of the defendants are potentially liable under the statute.

FCRA requires that "any person" who takes an adverse action is liable. 15 U.S.C. § 1681m(a). The definition of "any" includes the plural. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("one, a, an, or some; one or more without specification or identification"). With regard to insurance transactions, liability attaches whenever an adverse action is taken "in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). This broad "in connection with" language confirms that a variety of entities may be liable. No provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance. Therefore, the defendants find themselves in the difficult position of persuading us that Congress intended something different from what it wrote. We analyze their three arguments separately.

First, GEICO argues that the words "applied for" in the definition of adverse action, § 1681a(k)(1)(B)(i), demonstrate that only the issuing company is liable under the statute. On that basis, GEICO asks us to hold that Edo "applied for" insurance only with GEICO Indemnity because that was the company that issued him a policy. The argument is frivolous, both factually and legally. As a matter of fact, Edo did not apply to one company but instead requested insurance from the GEICO family of companies. He did not specifically ask to be placed with GEICO Indemnity, and the GEICO Companies did not interpret his telephone call as requesting a policy with that company in particular, as evidenced by the evaluation by Government Employees of his eligibility for a pol-

icy from several of the GEICO affiliates. That he was placed with GEICO Indemnity and not another GEICO entity was the result of a decision made by Government Employees personnel, not the result of a limited application by Edo. Thus, GEICO's argument has no basis in fact. Furthermore, as a matter of law, we refuse to turn the words "applied for" into a legal term of art that refers only to the issuing company. The clearest indication that Congress did not intend the words "applied for" to be used in such an unusual manner is that this interpretation would eliminate all potential FCRA liability for denials of insurance. No one disputes that FCRA defines the term adverse action to include denials. 15 U.S.C. § 1681a(k)(1)(B)(i). However, under GEICO's interpretation, because a consumer has not "applied for" insurance unless a policy has been issued and because a company that denies insurance has not, by definition, issued a policy, adverse action notices would never be required for denials of insurance. This is manifestly contrary to the statute, as it would eliminate from its coverage an important set of actions that Congress clearly intended to subject to FCRA's requirements.

Second, all the defendants argue that "*takes* any adverse action" limits FCRA's adverse action notice requirement to companies that actually issue an insurance policy. We find no such limitation in the statute by virtue of Congress's use of the word "takes" or otherwise. 15 U.S.C. § 1681m(a). To the contrary, adverse action is defined far more broadly than just "issuance." 15 U.S.C. § 1681a(k). The statutory definition specifically includes denials and cancellations as well as increases in rates, and other unfavorable changes, whenever and by whomever made. The word "takes" neither adds to nor detracts from that definition. It describes the act of engaging in the conduct that gives rise to the notice requirement. As discussed below, all of the companies at issue here took "adverse actions," as that term is defined in the statute.

Third and finally, all the defendants argue that we should hold liable only the issuing company because hold-

ing several companies liable for FCRA violations arising out of the issuance or denial of a single application will result in multiple, confusing adverse action notices, which would thwart rather than further FCRA's purpose. Such is not the case. Joint and several liability simply imposes the obligation on all of the affiliated companies responsible for taking an adverse action to ensure that the affected consumer receives a statutory notice describing the adverse affect of his credit report within that family of companies. Multiple notices are not required; a single notice from the companies involved identifying those companies and their respective roles will suffice.

Holding all the companies that take adverse action against a consumer jointly responsible for issuing a notice furthers FCRA's objectives. For example, joint responsibility substantially increases the prospect that an adverse action notice will be sent and that a customer who seeks to obtain insurance from a group of affiliated companies will be informed as to the manner in which his credit information adversely affected him. By imposing joint and several liability, Congress also improved the quality of information consumers receive, because each of the companies that takes an adverse action against the consumer must say so in the notice. We doubt that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure. By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy.

On the basis of the record before us all three GEICO Companies and Hartford Fire may be held liable under FCRA, as may the two other Hartford entities as to which leave to amend was denied.[15] Two of the GEICO Compa-

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[15] While the parties do not agree on every issue of fact, we hold that on the record before us there is no issue of material fact as to whether (1) Government Employees and Hartford Fire made the decisions that

nies, working together, are responsible for increasing Edo's charge for insurance: Government Employees, which made the decision as to which of the GEICO family of companies would issue the insurance to Edo and, in so doing, determined that he would be charged at an increased rate, and GEICO Indemnity, which then issued the insurance policy at that increased rate. GEICO General is responsible because it denied Edo insurance for the reason that his credit rating was not sufficiently high. Hartford Fire, like Government Employees, made the critical rate-to-be-charged decision. It determined that, on the basis of Reynold's credit report, he was not eligible for the lower rates afforded by its affiliates to the qualifying AARP members and that he would be charged for his insurance at a higher rate. Hartford Fire may therefore be held liable for increasing Reynolds' charges for insurance on the basis of his credit rating. Hartford PCIC and Hartford Midwest issued the policies to Reynolds at the increased rates determined by Hartford Fire, and may, accordingly, be held liable as well.

In sum, Government Employees, GEICO General, and GEICO Indemnity may be held jointly and severally liable for failing to issue an adverse action notice to Edo. Likewise, Hartford Fire may be held liable for failing to issue a notice to Reynolds, and Reynolds may also properly state claims against Hartford PCIC and Hartford Midwest. Thus, Reynolds should be permitted to amend his claims on remand.

F. Meaning Of Willfully

Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in

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increased Edo's and Reynolds' rates, respectively. (2) GEICO General denied Edo a policy, and (3) GEICO Indemnity issued Edo a policy at an increased rate. All of these actions were taken by the companies involved and all constituted "adverse actions" within the meaning of FCRA.

FCRA.[16] Interestingly, there is no legislative history to explain what Congress intended by the use of that term.

We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." *See Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir.2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir.2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir.2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir.1998); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997). An act that is merely negligent is not willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) ("The word 'willful' is widely used in the law, and, although it has not by any means been given a perfect consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."). Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive." *See, e.g., Dalton*, 257 F.3d at 418 (holding that a plaintiff need not show malice or evil motive); *Cousin*, 246 F.3d at 372 (same); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir.1998); *Cushman*, 115 F.3d at 226 (same). *But see Duncan*, 149 F.3d at 429 (requiring "'a motivation to injure'"). In this respect, for purposes of willfulness we distinguish civil from criminal liability. *See Bryan v. United States*, 524 U.S. 184, 191, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) ("Most obviously [willfulness] differentiates between deliberate and unwitting conduct, but *in the criminal law* it also typically refers to a culpable state of mind." (emphasis added)).

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[16] "Any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. 15 U.S.C. § 1681n (emphasis added).

Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Cushman*, 115 F.3d at 227. We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (quoting *Thurston* and holding that, for an alleged civil violation of the Age Discrimination in Employment Act (ADEA), "willful" requires only a "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA'"); *McLaughlin*, 486 U.S. at 134 n.13, 108 S.Ct. 1677 (using the *Thurston* definition of "willful" in interpreting the Fair Labor Standards Act); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43, 58 S.Ct. 533, 82 L.Ed. 773 (1938) (holding civil defendant's failure to unload a cattle car was "willful" because it showed a disregard for governing statute and an indifference to its requirements). The Court's rule with respect to civil cases differs from its rule in criminal proceedings. In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute. *See Bryan*, 524 U.S. at 196, 118 S.Ct. 1939 (requiring "knowledge that the conduct is unlawful" in a criminal case); *Ratzlaf v. United States*, 510 U.S. 135, 149, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (requiring proof that the criminal defendant "knew the structuring [of financial transactions] in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S.

192, 201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (requiring proof that a criminal "defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").[17]

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless dis-

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[17] The Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law. *Phillips*, 312 F.3d at 370 ("[W]ilful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law."). The Sixth Circuit has implied that actual knowledge is necessary. *Duncan*, 149 F.3d at 429 (suggesting that an actual belief of legality suffices to defeat willfulness liability under FCRA). The Eighth and Sixth Circuits, however, ignore *Thurston* and the cases that follow its reasoning.

regard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a reasonable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides unreasonable answers to issues of first impression is sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement.

Here, Hartford Fire, GEICO General, GEICO Indemnity, and Government Employees' interpretation of the statute was not reasonable. Indeed, the companies' exceedingly narrow interpretations of their obligations under FCRA were counter to the statute's plain text as well as its purpose. Relying on reasoning that was objectively unmeritorious, these companies sought to benefit from the privilege of using consumers' private credit information and yet be free of the attendant obligations. Specifically, Hartford Fire's contention that FCRA's adverse action notice requirement does not apply when a company charges a higher price for an initial insurance policy, but only when it has previously charged the consumer a lower rate, finds no basis in the statute. Likewise, its argument that adverse action notices are not required when a credit transmission reports that a consumer does not have adequate credit information to generate a score is clearly contrary to FCRA's language and to the purpose of the statute. Furthermore, Hartford Fire's argument that an adverse action notice sufficiently complies with FCRA's requirement even if it does not disclose that an adverse action was taken or the nature of that action is nonsensical. The GEICO Companies' argument that they are free to send adverse action notices only to those consumers whose credit rating is below average and not to those with a higher rating also finds absolutely no support in the

statute. Likewise, GEICO General does not make even a colorable argument that it did not take adverse action against Edo when, acting in conjunction with the other affiliated companies, it failed to provide him with a policy at a preferred rate; denials are clearly covered by the adverse action definition. Finally, Hartford Fire and Government Employees' argument that they are not liable because, even though they may have made the decision to increase the consumers' rates, they did not issue the policies is unreasonable as the statute on its face is not limited to issuers. We therefore hold that on the record before us the defendants all acted in reckless disregard of the consumers' statutory rights.[18] Accordingly, defen-

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[18] The dissent argues that we should not decide the question whether the companies wilfully failed to comply with FCRA's requirements because the district court did not reach the issue. We disagree. The district court did rule directly on all of the principal issues on which we hold the companies' positions to be unreasonable and necessarily found them reasonable. For example, as to Hartford Fire's contention that FCRA's adverse action notice requirement does not apply to an initial charge, the district court concluded that Hartford Fire was correct and that the initial setting of an insurance premium at a rate higher than the best rate available does not constitute an "adverse action" under FCRA. *Rausch v. Hartford Financial Services Group, Inc.*, 2003 WL 22722061, at *2 (D.Or.2003). As to the GEICO Companies' argument that they are free to send adverse action notices only to consumers whose credit rating is below average, as we have explained in the text at footnote 12, this claim is functionally identical to GEICO's argument that the action was not adverse because the charge was the same as if no credit information had been used. *See* n.12, *supra*. With respect to this issue, the district court ruled that GEICO was correct when it concluded that, because the premium charged to Edo would have been the same regardless of the information contained in Edo's credit history, there was no genuine issue of material fact as to whether GEICO Indemnity took an adverse action against Edo. *Edo v. Geico Casualty Co.*, No. 02-678, slip op. at 11 (D.Or. February 23, 2004). As to GEICO's argument that denials of coverage are not covered by the adverse action definition, the district court again held that GEICO was correct and that Edo had "failed to establish that GEICO Casualty's failure to offer him automobile insurance was an adverse action." *Id.* at 12.

Finally, as to both Hartford Fire and Government Employee's argument that they are not liable because they did not issue the policies,

dants' argument for summary judgment on the basis that they did not act willfully also fails.

III. CONCLUSION

In conclusion, we hold that FCRA applies, *inter alia*, to the first rates charged in initial insurance policies. We also hold that FCRA requires insurance companies to send adverse action notices whenever they charge a higher rate for insurance, in initial policies or otherwise, because of the consumer's credit information, not simply when the consumer's credit rating is below average. Furthermore, we hold that a communication that there is a lack of sufficient credit information regarding a consumer is a credit report within the meaning of FCRA. In addition, we hold that adverse action notices must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. With respect to which companies in a group may be liable under FCRA, we hold that a company that makes the rate-setting decision, a company that issues the insurance policy, and any company that denies insurance at a more favorable rate may be held jointly and severally liable, and that such companies may provide a single adverse action notice to consumers containing all of the requisite information. Finally, we adopt the Third Circuit's definition of "willfully": Reckless disregard is sufficient.

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the district court once again agreed, holding that only the entity that issues the insurance policy can be held to have taken an adverse action under FCRA. *Rausch*, 2003 WL 22722061 at *1; *Edo*, slip op. at 10-11.

Because the district judge has already ruled that the companies' positions on all of the principal issues were correct as a matter of law, she has also held, a fortiori, that the companies' positions were not unreasonable. Under these circumstances and because the question of the reasonableness of a legal contention is essentially a question of law, it is not necessary, and indeed would be futile, to remand to the district court the question whether the companies willfully failed to comply with FCRA.

As a consequence of these rulings, we hold that the district court erred in granting summary judgment to Hartford Fire on the basis that increased charges for insurance in an initial policy do not constitute adverse actions, and in denying Reynold's request for leave to amend his complaint to add Hartford PCIC and Hartford Midwest for that same reason. Likewise, we hold that the district court erred in granting summary judgment to GEICO Indemnity on the basis that the actions it took were not adverse and granting summary judgment to Hartford Fire, Government Employees, and GEICO General on the basis that only the issuer of insurance can be liable under FCRA. Finally, we hold that summary judgment may not be granted on the alternative grounds that a transmission that a consumer has insufficient credit information to generate a score is not a credit report, that Hartford Fire's adverse action notices were sufficient, or that the defendants' actions were not willful. In sum, we reverse the district court's grant of summary judgment with respect to all defendants in both *Edo* and *Reynolds*, reverse its denial of Reynold's request to amend his complaint to add Hartford PCIC and Hartford Mid-west, and remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

BYBEE, Circuit Judge, dissenting in part.

I join the majority opinion except so much of Section II.F that concludes that GEICO and Hartford insurance companies willfully violated FCRA. The district court awarded judgment to the insurance companies on summary judgment without reaching the question whether the companies "willfully fail[ed] to comply" with the requirements of FCRA. 15 U.S.C. § 1681n(a). The insurance companies urged the district court, as an alternative ground, to hold that the companies did not act willfully as a matter of law. They urged the same position to us on appeal as an alternative ground for affirming the judgment. The appellants did not brief the question of will-

fulness until the reply briefs, and in each case the appellants requested that we decline to rule for the insurance companies and remand the case to the district court for further proceedings.

I would not decide, as a matter of law or fact, that the insurance companies behaved willfully on the basis of their lawyers' arguments on appeal. I cannot conclude on the basis of the record before us that the companies' actions here were so "objectively unmeritorious," "clearly contrary to FCRA's language," "nonsensical," and without "colorable argument" that we can decide their willfulness ourselves without the benefit of findings of fact. Maj. Op. at 1115-1116 [App., *supra*, 64a-66a].

Accordingly, I would remand the question of whether the companies willfully failed to comply with FCRA to the district court for further proceedings. I respectfully dissent as to that portion of the opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-35695 & 04-35279

JASON RAY REYNOLDS, ET AL.,
Plaintiffs-Appellants,

V.

HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL.,
Defendants-Appellees,

AJENE EDO,
Plaintiff-Appellant,

V.

GEICO CASUALTY COMPANY,
Defendant,

AND

GEICO GENERAL INSURANCE COMPANY, ET AL.,
Defendants-Appellees.

[Argued and Submitted Mar. 8, 2005]

[Filed Oct. 3, 2005]

[Amended Oct. 24, 2005]

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

REINHARDT, Circuit Judge.

Under the Fair Credit Reporting Act ("FCRA"), insurance companies are required to send adverse action notices to consumers whenever they increase the rates for insurance on the basis of information contained in

consumer credit reports. 15 U.S.C. §§ 1681a(k)(1)(B)(i), 1681m(a).[1] The principal question before us is straightforward: Does FCRA's adverse action notice requirement apply to the rate first charged in an initial policy of insurance? We hold that the answer is yes: The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate.

We also resolve five ancillary questions. First, we hold that FCRA's adverse action notice requirement applies whenever a consumer would have received a lower rate for insurance had his credit information been more favorable, regardless of whether his credit rating is above or below average. Specifically, the requirement covers those whose credit information is disregarded and replaced for purposes of a rate computation by an average or neutral credit figure, so long as the insurance rates would have been lower had the credit information been more favorable. Second, we hold that charging more for insurance on the basis of a transmission stating that no credit information or insufficient credit information is available constitutes an adverse action based on information in a consumer report and therefore requires the giving of notice under FCRA. Third, we hold that, to comply with FCRA's notice requirement, a company must, *inter alia*, communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer,

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[1] Section 1681m(a) provides that any person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide "notice of the adverse action to the consumer." Section 1681a(k)(1)(B)(i) defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

and identify the party or parties taking the action. Fourth, we hold that when a consumer applies for insurance with a family of companies and is charged a higher rate for insurance because of his credit report, two or more companies within that family may be jointly and severally liable. The notice requirement applies to any company that makes a decision that a higher rate shall be imposed, issues a policy at a higher rate, or refuses to provide a policy at a lower rate, if the company's action is based in whole or in part on the consumer's credit information.[2] Finally, we adopt the Third Circuit's definition of "willfully," as that term is employed in FCRA, and hold that a company is liable for a willful violation of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir.1996) (as amended)). Like the Third Circuit, we hold that conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Id.* at 227.

I. THE ACT AND THE APPEALS

The Fair Credit Reporting Act seeks to ensure the "[a]ccuracy and fairness of credit reporting" through a variety of means. 15 U.S.C. § 1681. Central to this goal, FCRA limits the persons who may obtain consumer credit reports and requires users of such reports to notify consumers when, in reliance on a consumer report, "adverse action" has been taken. 15 U.S.C. §§ 1681a, 1681b, 1681m. Specifically, § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer." Adverse action notices advise consumers that an adverse action

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[2] We do not intend this list to be exhaustive.

has been taken against them, and the nature of that action, and alerts them that they may view a copy of the consumer report that triggered the adverse action free of charge and correct any errors affecting their economic well-being. Even if reports are free from error, adverse action notices give consumers important information about how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future.

To resolve the various issues that have arisen regarding FCRA's notice of adverse action requirement in a set of related cases, we have consolidated two appeals for purposes of this opinion: *Reynolds v. Hartford Financial Services Group, Inc.*, 2005 WL 2714503 and *Edo v. GEICO Casualty Co.*, 2004 WL 2731226. *Reynolds* presents the principal issue: May a rate first charged in an initial policy of insurance constitute an increased rate for purposes of the FCRA adverse action notice requirement? Hartford Fire asserts that a rate cannot qualify as increased unless a lower rate has previously been charged to the customer. *Reynolds* also presents the issues whether a communication stating that no credit information or insufficient credit information is available constitutes a "consumer report" under the statute and whether an adverse action notice that does not tell the consumer that an adverse action has been taken against him, describe that action and its effect upon the consumer, and identify the parties taking the action is sufficient under FCRA. *Edo* presents the issue whether an adverse action occurs whenever a consumer would have received a lower rate if his credit information had been more favorable; or whether an insurance company's practice of providing an adverse action notice only if the consumer's credit information is below average (or "neutral") and that factor results in the imposition of a higher rate than if his credit rating had been average, is consistent with FCRA. Both *Edo* and *Reynolds* also require us to decide which companies are liable under FCRA for the failure to give notice of an increased rate when several affiliated companies are involved in the

process of rate-setting and policy issuance. Finally, defendants in both cases seek summary judgment on the alternative ground that their actions were not willful as a matter of law. To address this last contention, we must define the meaning of the term "willfully" as it applies in FCRA.

A. Reynolds v. Hartford Financial Services Group, Inc.

Jason Reynolds is the sole remaining named-plaintiff in this class action against Hartford Fire Insurance Company ("Hartford Fire").[3] He seeks statutory and punitive damages, as well as reasonable attorneys fees for the company's violation of FCRA's adverse action notice requirement. Reynolds' claims relate to two insurance policies he obtained, one for automobile and the other for homeowners insurance. On the record before us, Hartford Fire set the rates to be charged for both policies. Hartford Property and Casualty Insurance Company of Hartford ("PCIC Hartford") issued Reynolds the homeowners insurance policy and Hartford Insurance Company of the Midwest ("Hartford Midwest") issued him the automobile insurance policy. We refer to Hartford Fire, Hartford PCIC, and Hartford Midwest as the "Hartford Companies."

Reynolds originally sued Hartford Fire and later sought to amend his complaint to add PCIC Hartford and Hartford Midwest.[4] Hartford Fire sought summary judgment, which the district court granted on two grounds. First, it held that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Second, and in the alternative, it held that an insurance company that issues a policy to a

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[3] Rausch is no longer pursuing his appeal.

[4] Reynolds also named Hartford Financial Services Group, Inc., which serves as a holding company, but is not pursuing his claims against that entity.

new policy-holder "cannot [be held to] 'increase' a charge for insurance unless the insurer makes an initial demand for payment of the insured and subsequently increases the amount of that demand based on information in the insured's credit report." The second and alternative holding relies on a previous decision by the same court, *Mark v. Valley Insurance Co.*, 275 F.Supp.2d 1307, 1317 (D.Or.2003). On the basis of that earlier decision, the district court also denied Reynolds leave to amend, reasoning that he could not "state viable FCRA claims against the proposed defendants," PCIC Hartford and Hartford Midwest. In other words, leave was denied on the ground that the policies were initial issues and no previous charge had been made to the customer at a lower rate.

The Hartford Companies' Use of Credit Information

During the relevant time period, Hartford Fire and the American Association of Retired Persons ("AARP") had an agreement under which Hartford Fire or one of its subsidiaries would issue automobile and homeowners insurance to AARP members at a premium rate if those individuals enjoyed favorable credit ratings. While the procedures used for issuing the two kinds of insurance varied slightly, they were the same in most relevant respects. In both cases, employees of Hartford Fire would make all of the decisions concerning AARP members' insurance policies for all of its subsidiaries, including Hartford Midwest, which issued automobile insurance, and PCIC Hartford, which issued homeowners insurance. In doing so, Hartford Fire's employees would obtain credit information from Trans Union, a consumer information bureau, through a contract to which Hartford Fire and Trans Union were signatories. This information would be conveyed to Hartford Fire through the risk assessment and data supply firm, ChoicePoint, in the form of an "insurance score." High insurance scores correlated with more favorable credit reports. With regard to automobile insurance, if an AARP member had a high enough insurance score, he would qualify for a ten percent discount. With regard to homeowners insurance, only if the member obtained a

top insurance score could he be assigned to the top tier of insurance with the best rate.

If, when Hartford Fire sent a request for an insurance score, no credit information matched the name and address of the consumer or if the information that did match was insufficient to generate an insurance score, this information would be transmitted to the company, and the consumer would be labeled a "no hit" or a "no score" and would not be assigned an insurance score. Without an insurance score, the consumer could not qualify for the ten percent discount with Hartford Midwest, nor could he be placed in the top insurance tier with PCIC Hartford. As a result, a "no hit" or "no score" consumer would in numerous instances pay more for insurance than if he had received a high insurance score.[5]

The Hartford Companies' Adverse Action Policy

Hartford Fire is the only one of the Hartford Companies to have developed or sent adverse action notices. The parties dispute whether Hartford Fire actually sent an adverse action notice to Reynolds, but that is a question of fact for the fact-finder. Whether the notice Hartford Fire contends it sent was adequate under FCRA is a question of law that we discuss below.

Reynolds' Insurance Policies

Reynolds applied for both automobile and homeowners insurance by contacting the Hartford Companies. He had no existing policy with that group. An employee of Hartford Fire collected personal information and attempted to obtain Reynold's insurance score twice, once for each in-

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[5] In connection with Reynolds' request for automobile insurance, he was labeled a "no hit" because his name and address did not match any person's in the national database. In connection with his homeowners insurance request, he was labeled a "no score" because, while his name and address did call up information in the database, the information was insufficient to generate an insurance score. As both a label of "no hit" and "no score" have the same practical effect, for convenience's sake we will here after refer in this opinion to a report in either category as a "no hit."

surance application. The credit bureau reported both times that Reynolds was a "no hit." *See* n. 5, *supra*. Although Hartford Midwest issued him an automobile insurance policy and Hartford PCIC issued him a homeowners insurance policy, as a result of his "no hit" status Reynolds did not receive either of the AARP premium rates.

B. Edo v. GEICO Casualty Co.

The second of the consolidated cases relates to an automobile insurance policy obtained by Ajene Edo. Like Reynolds, Edo seeks statutory and punitive damages, as well as reasonable attorney fees, on behalf of a class of consumers for violation of FCRA's adverse action notice requirement. He, too, is the sole remaining named-plaintiff. Edo appeals the district court's grant of summary judgment to defendants Government Employees Insurance Company ("Government Employees"), GEICO General Insurance Company ("GEICO General"), and GEICO Indemnity Corporation ("GEICO Indemnity").[6] These are affiliated companies, all of which are subsidiaries of the GEICO Corporation and are referred to collectively by the parties as the "GEICO Companies." We sometimes refer to that group of companies by that designation and sometimes simply as GEICO.

Unlike Hartford Fire, the GEICO Companies concede that adverse actions can occur with respect to the first rates charged in an initial policy of insurance. They do not assert that in order for an adverse action to occur there must be an increase to a rate that the consumer has previously been charged. Nevertheless, the district court granted summary judgment with respect to the various GEICO entities on a number of different grounds. First, the court held that Edo did not have standing to bring a

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[6] Edo is not pursuing his appeal against GEICO Casualty Corporation ("GEICO Casualty"), a company that writes insurance policies for high risk consumers and charges the highest rates. GEICO Casualty did not issue a policy of insurance to Edo, and Edo did not seek to obtain a policy at the unfavorable rates the company charged.

FCRA claim against Government Employees because he "was not eligible for insurance coverage from [that company] regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel." Next, it granted summary judgment in favor of GEICO General because that company "did not contract with Plaintiff to issue or to underwrite an insurance policy." This ruling was in accord with the district court's previous holdings in other related cases that only the company that issues the insurance policy can be held to have taken an adverse action under FCRA. *See Ashby v. Farmers Group, Inc.*, 261 F.Supp.2d 1213, 1222 (D.Or.2003); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F.Supp.2d 977, 989-90 (D.Or.2003). Finally, it granted summary judgment to GEICO Indemnity because "the premium charged to [Edo] by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."

GEICO's Use of Credit Information

The GEICO Companies are organized by risk. GEICO General provides preferred policies with low rates for those who are lesser insurance risks. Government Employees also provides preferred policies, but only to government employees. GEICO Indemnity issues standard policies with mid-level rates for moderate risk consumers. Finally, GEICO Casualty issues non-standard policies with high rates for those who are greater risks. The GEICO Companies began using consumer credit reports in early 1999.

In order to purchase insurance, consumers call a toll-free number and talk to a GEICO sales counselor. The sales counselor is employed by Government Employees but works on behalf of all of the GEICO Companies. Indeed, all of the work of the GEICO Companies is performed by Government Employees workers, as the other companies do not have any employees. Upon learning that a customer wishes to purchase automobile insurance, the sales counselor elicits basic information and asks

whether he may use the customer's credit information when arranging for his policy. If the customer acquiesces, the sales counselor obtains the credit information in the form of an insurance score calculated by the data analysis firm Fair Isaacs from information supplied by Trans Union. Government Employees is the only GEICO company that has a contract with Trans Union and Fair Isaacs to provide this information. Using a Government Employees computer system, the sales counselor converts the insurance score to a credit weight and combines it with other weights assigned to other insurance factors, such as age and number of accidents to arrive at a final total insurance weight. Based on that final weight, the sales counselor assigns the customer to one of the GEICO Companies and determines the appropriate insurance tier. This determination serves to establish the rate the consumer will be charged. After the information the customer has provided has been verified, he is issued an insurance policy at that rate.

GEICO's Adverse Action Policy

The GEICO Companies' original FCRA policy, adopted in 1999, was to send adverse action notices to all consumers whose credit reports were used in making insurance decisions. Later that same year, GEICO changed its policy, at least in part to reduce costs. Instead of sending adverse action notices to everyone, GEICO developed a system for determining which actions it deemed adverse by comparing the rate charged to the rate that it would have charged had the credit information been "neutral."

GEICO's new system, however, did not comply with FCRA's requirements. The GEICO Companies' policy during the period relevant to this case was to compare the consumer's actual company and tier placement (which, as described above, was based in part on his credit rating) with the company and tier to which he would have been assigned had a "neutral" credit weight been substituted for his actual credit weight when calculating the final total insurance weight. The GEICO Companies' "neutral" credit weight was defined, generally speaking, as the

weight that reflected the average credit rating of all consumers. The GEICO Companies would calculate two final total insurance weights, using only one variable – the actual credit weight in one case, and the "neutral" credit weight in the other. Only if the final total insurance weight using the "neutral" credit weight would have resulted in the consumer's placement with a different company or in a different tier than that to which the consumer was actually assigned, and only if such different placement would have resulted in the consumer's being charged a lower rate, would GEICO Companies issue an adverse action notice. In other words, the GEICO Companies' policy was to refrain from sending a statutory notice if use of the consumer's actual credit information caused the applicant to be placed with an entity and in a tier that resulted in the charging of the same or a lower rate than the rate that he would have been charged had the calculation and the ensuing assignment been based on a "neutral" or average credit rating. Under this policy, even if the rate ultimately charged was higher than the rate to which the consumer would have been entitled had he had a more favorable credit rating, the statutory notice was not sent if use of the "neutral" and the actual credit data would have led to an assignment to the same entity and tier. Thus, it was not GEICO's policy to send adverse action notices to all consumers who would have been charged lower rates had they enjoyed a more favorable credit rating.

Edo's Insurance Application

Following Edo's call to GEICO's toll-free number, the sales counselor used the credit information he obtained to place its new customer with GEICO Indemnity. The GEICO Companies then applied its policy for determining whether an adverse action had occurred. GEICO calculated that, had the neutral credit weight been used instead of Edo's actual credit weight, the resulting final total weight would still have resulted in Edo's being placed with GEICO Indemnity. That Edo's placement, and the rate charged for his insurance, did not improve when the

"neutral" weight was used is not surprising, as Edo's actual credit weight was better than average. Under its policy, however, the GEICO Companies did not issue him an adverse action notice.

It is uncontested that if the GEICO Companies had used the highest credit weight that a consumer could receive rather than the neutral credit rate to determine Edo's alternate placement, GEICO would have placed Edo with GEICO General, a preferred company, and offered him a lower insurance rate. In short, if Edo's credit information had been more favorable (even though it was already above average), he would have been charged less for his insurance. In 2002, the GEICO Companies changed its policy and began to issue adverse action notices whenever a report with more favorable credit information would have resulted in a lower insurance rate. Under the new policy, Edo would have received the statutory notice.

II. ANALYSIS

A. Initial Policies of Insurance

The principal question in this and a number of related cases[7] constitutes a matter of first impression: Does FCRA's adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an increase in a rate that the consumer has previously been charged? As with all statutory interpretation, we begin with the text of the statute. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). An adverse action with respect to insurance is defined by 15 U.S.C. § 1681a(k)(1)(B)(i) as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

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[7] The related cases are resolved by memorandum dispositions filed separately.

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford, refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor – such as adverse credit information, age, or driving record[8] – regardless of whether the customer was previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance-score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

"Increase" means to make something greater. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) (defining "increase" as "growth, enlargement,

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[8] An adverse action under FCRA can, of course, only occur if the increase in charge was due to "information contained in a consumer report." 15 U.S.C. § 1681m(a). The consumer reports at issue in these cases are credit reports. While increases in charges may occur because of many factors, plaintiffs contest only the increases due to unfavorable credit information.

etc[.]"). "Charge" means the price demanded for goods or services. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers [the Truth in Lending Act's] disclosure requirements." *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir.2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

Second, the statutory definition of "adverse action," as it is made applicable to insurance, explicitly encompasses "*any* insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Congress' use of the latter phrase demonstrates its intent that "adverse actions" apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy. The text of the statute does not permit the imposition of any temporal limitation. Hartford has suggested no sensible alternative reading of "existing or applied for." Thus, reading the terms "increase" and "charge" in the context of the provision as a whole, particularly the "existing or applied for" phrase, supports affording them their ordinary meaning.

Third, our interpretation of the terms at issue best comports with the stated purpose of FCRA: to ensure the

"[a]ccuracy and fairness of credit reporting." 15 U.S.C. § 1681. FCRA's adverse action notice requirement is an important tool that Congress created, using broad, encompassing language. Through this requirement, Congress sought to promote the rights of consumers by giving them essential information about how their credit report is used, information that they could obtain in no other way. The information Congress mandated serves two important ends. First and foremost, once consumers possess this information they can check and correct any errors in their credit reports. This increases the chances that a consumer's financial stability will not be hampered by faulty credit information. It also improves the overall accuracy of credit reports, which facilitates the operation of our markets. Second, even when credit reports are accurate, informing consumers when their credit rating is hurting them in the marketplace gives them important information about the benefits of improving their credit rating in the future and may even assist them in learning how to do so.

Hartford Fire's contention that FCRA does not apply to the rate charged in initial insurance policies would seriously undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir.1995). While our interpretation is the plain one, this canon supports our result.

We hold that whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA. Therefore, the fact that Reynolds' policy was an initial one, and his rate

was the initial rate charged, is of no consequence. Reynolds' rate was increased above that which it would have otherwise been because of his credit report. As the statute's text is clear, we need not resort to either the agency's interpretations[9] or the statute's legislative history. The district court erred in granting summary judgment to Hartford Fire on the ground that FCRA does not apply to the rate first charged in an initial policy.[10]

B. What Constitutes An Adverse Action

The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-

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[9] We note that our holding is consistent with the Federal Trade Commission's interpretation of the statute. Because we find FCRA unambiguous, however, we reach our decision independently of, and do not defer to, the agency's interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[10] Although our discussion has principally related to initial insurance policies, our interpretation of "increase in any charge" is obviously not limited to a consumer's first policy. As we have explained, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price. This definition applies equally to initial issues, amendments, and renewals of insurance policies.

average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.

FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him.[11] Such is the case with Edo. Because Edo would have been placed with GEICO General instead of GEICO Indemnity and thus would have been charged a lower rate if his credit rating had been higher, an adverse action occurred and an adverse action notice was required under FCRA.[12] Under the GEICO formula, the fact that the credit rating Edo actually received was higher than the average rating did not mean that Edo would not be charged a higher rate

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[11] We note that the statute does not require an insurance company to issue an adverse action notice simply because a consumer does not get the best possible rate. If a better credit report would not have reduced the consumer's insurance rate, his credit report is not the cause of the higher price and therefore no adverse action based on a credit report has occurred.

[12] Making a slightly different argument, at least rhetorically, the GEICO Companies also argue that the action they took against Edo was not adverse because he was placed in the same company that he would have been placed in had his credit information not been used. While this is a true statement, it is only so because if the consumer refuses to allow his credit information to be used, the sales counselor assigns the consumer the "neutral" credit weight. Therefore, the GEICO Companies' argument that the action was not adverse because it was the same as if no credit information had been used is functionally identical to its argument that the action was not adverse because it was not detrimental when compared to the result using a "neutral" credit rating. Thus, this argument fails as well.

than he would have been charged had he had an even better credit report, but it ensured that he would not receive an adverse action notice when he was charged that increased rate. The district court erred in granting GEICO Indemnity summary judgment on the ground that Edo's rate was not increased on the basis of his credit report.

C. "No Hit" Adverse Actions

Hartford Fire makes a separate argument as to why in Reynolds' case no adverse action was taken. Specifically, the company argues that no adverse action was taken against Reynolds "based in whole or in part on any information contained in a consumer report" within the meaning of 15 U.S.C. § 1681m(a). When Hartford Fire requested credit information about Reynolds, Trans Union did not possess the necessary information to generate an insurance score and transmitted this finding to the insurer. Reynolds was therefore considered a "no hit." *See* n.5, *supra*. Because he was so designated, Reynolds was rendered ineligible for the premium rates available to AARP members with qualifying credit ratings, and, as a result, was charged a higher rate in his initial policies. Hartford Fire argues, however, that these were not adverse actions because, it contends, an "adverse action" occurs only if it is based on "information contained in a consumer report" and no such report was received with respect to Reynolds. We reject Hartford Fire's argument.

FCRA's definition of "consumer report" is broad. It unquestionably encompasses a credit reporting agency's communication to an insurance company that a consumer does not have enough information on file for an insurance score to be calculated. Specifically, 15 U.S.C. § 1681a(d)(1) explains that "[t]he term 'consumer report' means any written, oral, or other communication of *any information* by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . ." (emphasis added). Reporting that an agency cannot obtain any information regarding a consumer or that a consumer has insufficient credit information on file conveys a message regarding the consumer's

creditworthiness, standing, and capacity that makes his obtaining of credit far more difficult. Such a report suggests that the consumer cannot show that he pays debts in a timely manner. That information may be false: The credit agency may have used the wrong name or searched the wrong records, missing data that would have shown that the applicant is indeed creditworthy. Providing notice therefore serves the statutory purpose of allowing the consumer to correct errors in credit reports. Accordingly, we hold that a communication that a consumer has no information available or an insufficient credit history to permit the calculation of a credit rating qualifies as "a consumer report" within the meaning of FCRA. Because it is uncontested that Reynolds would have been charged lower insurance rates had he received qualifying credit ratings and because the application of the "no hit" rule precluded him from receiving such ratings, we hold that an adverse action was taken against him on the basis of information contained in a credit report. Accordingly, the district court's order of summary judgment may not be affirmed on the ground that its actions with respect to Reynolds were not based on such information.

D. Adequacy Of The Notice

Hartford Fire also urges us to affirm the district court's grant of summary judgment on the alternative ground that, although (in its view) it was not required under FCRA to send adverse action notices, the notices that the Hartford Companies did send were sufficient to meet its FCRA responsibilities. We reject this argument because the notices were inadequate as a matter of law. Under 15 U.S.C. § 1681m(a)(1), a company that takes adverse action on the basis of a consumer report must "provide oral, written, or electronic notice of the adverse action to the consumer" as well as meet a number of other specific requirements.[13] While the term "notice of an adverse ac-

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[13] The notice must also contain information regarding the consumer reporting agency. It must provide the name, address, and telephone number of the agency that provided the report, a statement that the

tion" is not defined in the statute, we hold that, at a minimum, such a notice must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.[14] *See Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir.1983) (requiring disclosure of "reliance on data contained in [a consumer's] credit report" when providing notice of an adverse action).

The notices Reynolds received did not comply with any of the above requirements. They did not tell him that any adverse action had been taken against him. They simply stated that "[t]he Hartford's eligibility and pricing decisions are based in part on consumer report(s) from a consumer reporting agency" and allowed him to make a written request in order to find out more. Reynolds was entitled to be informed that his rate for insurance was increased because of information in his credit report. He was also entitled to be told that Hartford Fire made the pricing decision and that Hartford PCIC and Hartford Midwest issued him policies at those higher rates. FCRA recognizes the difference between telling a consumer that his credit information *could* affect his insurance rate and that it *did* adversely affect his rate, and requires notice of the latter. We therefore reject Hartford Fire's alternative argument for upholding the district court's order.

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agency did not make the adverse decision and is not able to explain it to the consumer, a statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the agency, and a statement setting forth the consumer's right to dispute directly with the agency the accuracy or completeness of any information in the report. *See* 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. § 698, App. H.

[14] We do not decide whether a fuller description of what specific information was adverse is required as this question is not before us.

E. Who Is Liable

The defendants all contend that only one company can be liable when an insurance policy contains an increase in rates – the issuing company. The plain text of the statute, as well as its purposes, are to the contrary. Here, we hold that all of the defendants are potentially liable under the statute.

FCRA requires that "any person" who takes an adverse action is liable. 15 U.S.C. § 1681m(a). The definition of "any" includes the plural. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("one, a, an, or some; one or more without specification or identification"). With regard to insurance transactions, liability attaches whenever an adverse action is taken "in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). This broad "in connection with" language confirms that a variety of entities may be liable. No provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance. Therefore, the defendants find themselves in the difficult position of persuading us that Congress intended something different from what it wrote. We analyze their three arguments separately.

First, GEICO argues that the words "applied for" in the definition of adverse action, § 1681a(k)(1)(B)(i), demonstrate that only the issuing company is liable under the statute. On that basis, GEICO asks us to hold that Edo "applied for" insurance only with GEICO Indemnity because that was the company that issued him a policy. The argument is frivolous, both factually and legally. As a matter of fact, Edo did not apply to one company but instead requested insurance from the GEICO family of companies. He did not specifically ask to be placed with GEICO Indemnity, and the GEICO Companies did not interpret his telephone call as requesting a policy with that company in particular, as evidenced by the evaluation by Government Employees of his eligibility for a pol-

icy from several of the GEICO affiliates. That he was placed with GEICO Indemnity and not another GEICO entity was the result of a decision made by Government Employees personnel, not the result of a limited application by Edo. Thus, GEICO's argument has no basis in fact. Furthermore, as a matter of law, we refuse to turn the words "applied for" into a legal term of art that refers only to the issuing company. The clearest indication that Congress did not intend the words "applied for" to be used in such an unusual manner is that this interpretation would eliminate all potential FCRA liability for denials of insurance. No one disputes that FCRA defines the term adverse action to include denials. 15 U.S.C. § 1681a(k)(1)(B)(i). However, under GEICO's interpretation, because a consumer has not "applied for" insurance unless a policy has been issued and because a company that denies insurance has not, by definition, issued a policy, adverse action notices would never be required for denials of insurance. This is manifestly contrary to the statute, as it would eliminate from its coverage an important set of actions that Congress clearly intended to subject to FCRA's requirements.

Second, all the defendants argue that "*takes* any adverse action" limits FCRA's adverse action notice requirement to companies that actually issue an insurance policy. We find no such limitation in the statute by virtue of Congress's use of the word "takes" or otherwise. 15 U.S.C. § 1681m(a). To the contrary, adverse action is defined far more broadly than just "issuance." 15 U.S.C. § 1681a(k). The statutory definition specifically includes denials and cancellations as well as increases in rates, and other unfavorable changes, whenever and by whomever made. The word "takes" neither adds to nor detracts from that definition. It describes the act of engaging in the conduct that gives rise to the notice requirement. As discussed below, all of the companies at issue here took "adverse actions," as that term is defined in the statute.

Third and finally, all the defendants argue that we should hold liable only the issuing company because hold-

ing several companies liable for FCRA violations arising out of the issuance or denial of a single application will result in multiple, confusing adverse action notices, which would thwart rather than further FCRA's purpose. Such is not the case. Joint and several liability simply imposes the obligation on all of the affiliated companies responsible for taking an adverse action to ensure that the affected consumer receives a statutory notice describing the adverse affect of his credit report within that family of companies. Multiple notices are not required; a single notice from the companies involved identifying those companies and their respective roles will suffice.

Holding all the companies that take adverse action against a consumer jointly responsible for issuing a notice furthers FCRA's objectives. For example, joint responsibility substantially increases the prospect that an adverse action notice will be sent and that a customer who seeks to obtain insurance from a group of affiliated companies will be informed as to the manner in which his credit information adversely affected him. By imposing joint and several liability, Congress also improved the quality of information consumers receive, because each of the companies that takes an adverse action against the consumer must say so in the notice. We doubt that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure. By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy.

On the basis of the record before us all three GEICO Companies and Hartford Fire may be held liable under FCRA, as may the two other Hartford entities as to which leave to amend was denied.[15] Two of the GEICO Compa-

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[15] While the parties do not agree on every issue of fact, we hold that on the record before us there is no issue of material fact as to whether (1) Government Employees and Hartford Fire made the decisions that

nies, working together, are responsible for increasing Edo's charge for insurance: Government Employees, which made the decision as to which of the GEICO family of companies would issue the insurance to Edo and, in so doing, determined that he would be charged at an increased rate, and GEICO Indemnity, which then issued the insurance policy at that increased rate. GEICO General is responsible because it denied Edo insurance for the reason that his credit rating was not sufficiently high. Hartford Fire, like Government Employees, made the critical rate-to-be-charged decision. It determined that, on the basis of Reynolds' credit report, he was not eligible for the lower rates afforded by its affiliates to the qualifying AARP members and that he would be charged for his insurance at a higher rate. Hartford Fire may therefore be held liable for increasing Reynolds' charges for insurance on the basis of his credit rating. Hartford PCIC and Hartford Midwest issued the policies to Reynolds at the increased rates determined by Hartford Fire, and may, accordingly, be held liable as well.

In sum, Government Employees, GEICO General, and GEICO Indemnity may be held jointly and severally liable for failing to issue an adverse action notice to Edo. Likewise, Hartford Fire may be held liable for failing to issue a notice to Reynolds, and Reynolds may also properly state claims against Hartford PCIC and Hartford Midwest. Thus, Reynolds should be permitted to amend his claims on remand.

F. Meaning Of Willfully

Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in

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increased Edo's and Reynolds' rates, respectively. (2) GEICO General denied Edo a policy, and (3) GEICO Indemnity issued Edo a policy at an increased rate. All of these actions were taken by the companies involved and all constituted "adverse actions" within the meaning of FCRA.

FCRA.[16] Interestingly, there is no legislative history to explain what Congress intended by the use of that term.

We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." *See Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir.2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir.2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir.2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir.1998); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997). An act that is merely negligent is not willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) ("The word 'willful' is widely used in the law, and, although it has not by any means been given a perfect consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."). Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive." *See, e.g., Dalton*, 257 F.3d at 418 (holding that a plaintiff need not show malice or evil motive); *Cousin*, 246 F.3d at 372 (same); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir.1998); *Cushman*, 115 F.3d at 226 (same). *But see Duncan*, 149 F.3d at 429 (requiring "'a motivation to injure'"). In this respect, for purposes of willfulness we distinguish civil from criminal liability. *See Bryan v. United States*, 524 U.S. 184, 191, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) ("Most obviously [willfulness] differentiates between deliberate and unwitting conduct, but *in the criminal law* it also typically refers to a culpable state of mind." (emphasis added)).

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[16] "Any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. 15 U.S.C. § 1681n (emphasis added).

Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Cushman*, 115 F.3d at 227. We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (quoting *Thurston* and holding that, for an alleged civil violation of the Age Discrimination in Employment Act (ADEA), "willful" requires only a "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA'"); *McLaughlin*, 486 U.S. at 134 n.13, 108 S.Ct. 1677 (using the *Thurston* definition of "willful" in interpreting the Fair Labor Standards Act); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43, 58 S.Ct. 533, 82 L.Ed. 773 (1938) (holding civil defendant's failure to unload a cattle car was "willful" because it showed a disregard for governing statute and an indifference to its requirements). The Court's rule with respect to civil cases differs from its rule in criminal proceedings. In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute. *See Bryan*, 524 U.S. at 196, 118 S.Ct. 1939 (requiring "knowledge that the conduct is unlawful" in a criminal case); *Ratzlaf v. United States*, 510 U.S. 135, 149, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (requiring proof that the criminal defendant "knew the structuring [of financial transactions] in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S.

192, 201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (requiring proof that a criminal "defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").[17]

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing non-compliance even though the answer to a previously undecided question is objectively apparent and imposing liability not withstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless dis-

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[17] The Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law. *Phillips*, 312 F.3d at 370 ("[W]ilful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law."). The Sixth Circuit has implied that actual knowledge is necessary. *Duncan*, 149 F.3d at 429 (suggesting that an actual belief of legality suffices to defeat willfulness liability under FCRA). The Eighth and Sixth Circuits, however, ignore *Thurston* and the cases that follow its reasoning.

regard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers to issues of first impression is sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement.[18] We hold that reliance on such implausible interpretations constitutes reckless disregard for the law and therefore amounts to a willful violation of the law.

Here, Hartford Fire, GEICO General, GEICO Indemnity, and Government Employees' interpretation of the statute was untenable. Indeed, the companies' exceedingly narrow interpretations of their obligations under FCRA were counter to the statute's plain text as well as its purpose. Relying on reasoning that was plainly unmeritorious, these companies sought to benefit from the privilege of using consumers' private credit information and yet be free of the attendant obligations. Specifically, Hartford Fire's contention that FCRA's adverse action notice requirement does not apply when a company charges a higher price for an initial insurance policy, but only when it has previously charged the consumer a lower rate, finds no basis in the statute. Likewise, its argument that adverse action notices are not required when a credit

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[18] Consulting with attorneys is evidence of lack of willfulness, but is not dispositive. *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 645 (9th Cir.1993); *accord Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 409 (5th Cir.1989) (stating that "seeking legal advice [does not] ipso facto establish[ ] the appropriate intent [willfulness]"). Thus, consultation with attorneys who then produce an implausible legal opinion that purports to relieve the insurance companies of their clear statutory responsibilities does not serve automatically to avoid a charge of reckless disregard.

transmission reports that a consumer does not have adequate credit information to generate a score is clearly contrary to FCRA's language and to the purpose of the statute. Furthermore, Hartford Fire's argument that an adverse action notice sufficiently complies with FCRA's requirement even if it does not disclose that an adverse action was taken or the nature of that action is nonsensical. The GEICO Companies' argument that they are free to send adverse action notices only to those consumers whose credit rating is below average and not to those with a higher rating also finds absolutely no support in the statute. Likewise, GEICO General does not make even a colorable argument that it did not take adverse action against Edo when, acting in conjunction with the other affiliated companies, it failed to provide him with a policy at a preferred rate; denials are clearly covered by the adverse action definition. Finally, Hartford Fire and Government Employees' argument that they are not liable because, even though they may have made the decision to increase the consumers' rates, they did not issue the policies is not colorable as the statute on its face is not limited to issuers. We therefore hold that on the record before us the defendants all acted in reckless disregard of the consumers' statutory rights.[19] Accordingly, defendants' ar-

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[19] The dissent argues that we should not decide the question whether the companies wilfully failed to comply with FCRA's requirements because the district court did not reach the issue. We disagree. The district court did rule directly on all of the principal issues on which we hold the companies' positions to be untenable and necessarily found their actions not to be willful as a result of their reliance on an untenable interpretation of the statute. For example, as to Hartford Fire's contention that FCRA's adverse action notice requirement does not apply to an initial charge, the district court concluded that Hartford Fire was correct and that the initial setting of an insurance premium at a rate higher than the best rate available does not constitute an "adverse action" under FCRA. *Rausch v. Hartford Financial Services Group, Inc.*, 2003 WL 22722061, at *2 (D.Or.2003). As to the GEICO Companies' argument that they are free to send adverse action notices only to consumers whose credit rating is below average, as we have explained in the text at footnote 12, this claim is functionally identical to GEICO's argument that the action was not adverse be-

gument for summary judgment on the basis that they did not act willfully also fails.

III. CONCLUSION

In conclusion, we hold that FCRA applies, *inter alia*, to the first rates charged in initial insurance policies. We also hold that FCRA requires insurance companies to send adverse action notices whenever they charge a higher rate for insurance, in initial policies or otherwise, because of the consumer's credit information, not simply when the consumer's credit rating is below average. Furthermore, we hold that a communication that there is a lack of sufficient credit information regarding a consumer is a credit report within the meaning of FCRA. In addition, we hold that adverse action notices must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify

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cause the charge was the same as if no credit information had been used. *See* n.12, *supra*. With respect to this issue, the district court ruled that GEICO was correct when it concluded that, because the premium charged to Edo would have been the same regardless of the information contained in Edo's credit history, there was no genuine issue of material fact as to whether GEICO Indemnity took an adverse action against Edo. *Edo v. Geico Casualty Co.*, No. 02-678, slip op. at 11 (D.Or. February 23, 2004). As to GEICO's argument that denials of coverage are not covered by the adverse action definition, the district court again held that GEICO was correct and that Edo had "failed to establish that GEICO Casualty's failure to offer him automobile insurance was an adverse action." *Id.* at 12. Finally, as to both Hartford Fire and Government Employee's argument that they are not liable because they did not issue the policies, the district court once again agreed, holding that only the entity that issues the insurance policy can be held to have taken an adverse action under FCRA. *Rausch*, 2003 WL at *1; *Edo*, slip op. at 10-11.

Because the district judge has already ruled that the companies' positions on all of the principal issues were correct as a matter of law, she has also held, a fortiori, that the companies' reliance on these positions did not amount to reckless disregard for the law. Under these circumstances and because the question of willfulness as applied to a legal contention is essentially a question of law, it is not necessary, and indeed would be futile, to remand to the district court the question whether the companies willfully failed to comply with FCRA.

the party or parties taking the action. With respect to which companies in a group may be liable under FCRA, we hold that a company that makes the rate-setting decision, a company that issues the insurance policy, and any company that denies insurance at a more favorable rate may be held jointly and severally liable, and that such companies may provide a single adverse action notice to consumers containing all of the requisite information. Finally, we adopt the Third Circuit's definition of "willfully": Reckless disregard is sufficient.

As a consequence of these rulings, we hold that the district court erred in granting summary judgment to Hartford Fire on the basis that increased charges for insurance in an initial policy do not constitute adverse actions, and in denying Reynold's request for leave to amend his complaint to add Hartford PCIC and Hartford Midwest for that same reason. Likewise, we hold that the district court erred in granting summary judgment to GEICO Indemnity on the basis that the actions it took were not adverse and granting summary judgment to Hartford Fire, Government Employees, and GEICO General on the basis that only the issuer of insurance can be liable under FCRA. Finally, we hold that summary judgment may not be granted on the alternative grounds that a transmission that a consumer has insufficient credit information to generate a score is not a credit report, that Hartford Fire's adverse action notices were sufficient, or that the defendants' actions were not willful. In sum, we reverse the district court's grant of summary judgment with respect to all defendants in both *Edo* and *Reynolds*, reverse its denial of Reynolds' request to amend his complaint to add Hartford PCIC and Hartford Midwest, and remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

BYBEE, Circuit Judge, dissenting in part:

I join the majority opinion except so much of Section II.F that concludes that GEICO and Hartford insurance

companies willfully violated FCRA. The district court awarded judgment to the insurance companies on summary judgment without reaching the question whether the companies "willfully fail[ed] to comply" with the requirements of FCRA. 15 U.S.C. § 1681n(a). The insurance companies urged the district court, as an alternative ground, to hold that the companies did not act willfully as a matter of law. They urged the same position to us on appeal as an alternative ground for affirming the judgment. The appellants did not brief the question of willfulness until the reply briefs, and in each case the appellants requested that we decline to rule for the insurance companies and remand the case to the district court for further proceedings.

I would not decide as a matter of fact that the insurance companies behaved willfully on the basis of their lawyers' arguments on appeal. I cannot conclude on the basis of the record before us that the companies' actions here were so "indefensible," "implausible," "untenable," "plainly unmeritorious," "clearly contrary to FCRA's language," "nonsensical," and without "colorable argument" that we can conclude that the companies' "reliance on such implausible interpretations constitutes reckless disregard for the law" and decide their willfulness ourselves without the benefit of findings of fact or full briefing.

If I thought our record was complete, I would not find that the companies willfully failed to comply with FCRA as a matter of law. The majority holds that we can reach the question because the district "necessarily found their actions not to be willful as a result of their reliance on an untenable interpretation of the statute." The reason the district court "*necessarily* found their actions not to be willful" is because the district court *agreed* with their legal position, a position the majority now declares to be "nonsensical" and "untenable." While I agree with the majority that the district court's understanding of FCRA was wrong, I cannot go so far as to conclude that the district court's conclusion, like the companies' position, was also untenable.

Accordingly, I would remand the question of whether the companies willfully failed to comply with FCRA to the district court for further proceedings. I respectfully dissent as to that portion of the opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-35695 & 04-35279

JASON RAY REYNOLDS, ET AL.,
Plaintiffs-Appellants,

V.

HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL.,
Defendants-Appellees,

AJENE EDO,
Plaintiff-Appellant,

V.

GEICO CASUALTY COMPANY,
Defendant,

AND

GEICO GENERAL INSURANCE COMPANY, ET AL.,
Defendants-Appellees.

[Argued and Submitted Mar. 8, 2005]

[Filed Jan. 25, 2006]

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

REINHARDT, Circuit Judge:

Under the Fair Credit Reporting Act ("FCRA"), insurance companies are required to send adverse action notices to consumers whenever they increase the rates for insurance on the basis of information contained in consumer credit reports. 15 U.S.C. §§ 1681a(k)(1)(B)(i),

1681m(a).[1] The principal question before us is straightforward: Does FCRA's adverse action notice requirement apply to the rate first charged in an initial policy of insurance? We hold that the answer is yes: The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate.

We also resolve five ancillary questions. First, we hold that FCRA's adverse action notice requirement applies whenever a consumer would have received a lower rate for insurance had his credit information been more favorable, regardless of whether his credit rating is above or below average. Specifically, the requirement covers those whose credit information is disregarded and replaced for purposes of a rate computation by an average or neutral credit figure, so long as the insurance rates would have been lower had the credit information been more favorable. Second, we hold that charging more for insurance on the basis of a transmission stating that no credit information or insufficient credit information is available constitutes an adverse action based on information in a consumer report and therefore requires the giving of notice under FCRA. Third, we hold that, to comply with FCRA's notice requirement, a company must, *inter alia*, communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.

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[1] Section 1681m(a) provides that any person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide "notice of the adverse action to the consumer." Section 1681a(k)(1)(B)(i) defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

Fourth, we hold that when a consumer applies for insurance with a family of companies and is charged a higher rate for insurance because of his credit report, two or more companies within that family may be jointly and severally liable. The notice requirement applies to any company that makes a decision that a higher rate shall be imposed, issues a policy at a higher rate, or refuses to provide a policy at a lower rate, if the company's action is based in whole or in part on the consumer's credit information.[2] Finally, we adopt the Third Circuit's definition of "willfully," as that term is employed in FCRA, and hold that a company is liable for a willful violation of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir.1996) (as amended)). Like the Third Circuit, we hold that conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Id.* at 227.

I. THE ACT AND THE APPEALS

The Fair Credit Reporting Act seeks to ensure the "[a]ccuracy and fairness of credit reporting" through a variety of means. 15 U.S.C. § 1681. Central to this goal, FCRA limits the persons who may obtain consumer credit reports and requires users of such reports to notify consumers when, in reliance on a consumer report, "adverse action" has been taken. 15 U.S.C. §§ 1681a, 1681b, 1681m. Specifically, § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer." Adverse action notices advise consumers that an adverse action has been taken against them, and the nature of that ac-

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[2] We do not intend this list to be exhaustive.

tion, and alerts them that they may view a copy of the consumer report that triggered the adverse action free of charge and correct any errors affecting their economic well-being. Even if reports are free from error, adverse action notices give consumers important information about how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future.

To resolve the various issues that have arisen regarding FCRA's notice of adverse action requirement in a set of related cases, we have consolidated two appeals for purposes of this opinion: *Reynolds v. Hartford Financial Services Group, Inc.*, No. 03-35695 and *Edo v. GEICO Casualty Co.*, 2004 WL 2731226. *Reynolds* presents the principal issue: May a rate first charged in an initial policy of insurance constitute an increased rate for purposes of the FCRA adverse action notice requirement? Hartford Fire asserts that a rate cannot qualify as increased unless a lower rate has previously been charged to the customer. *Reynolds* also presents the issues whether a communication stating that no credit information or insufficient credit information is available constitutes a "consumer report" under the statute and whether an adverse action notice that does not tell the consumer that an adverse action has been taken against him, describe that action and its effect upon the consumer, and identify the parties taking the action is sufficient under FCRA. *Edo* presents the issue whether an adverse action occurs whenever a consumer would have received a lower rate if his credit information had been more favorable; or whether an insurance company's practice of providing an adverse action notice only if the consumer's credit information is below average (or "neutral") and that factor results in the imposition of a higher rate than if his credit rating had been average, is consistent with FCRA. Both *Edo* and *Reynolds* also require us to decide which companies are liable under FCRA for the failure to give notice of an increased rate when several affiliated companies are involved in the process of rate-setting and policy issuance. Finally, de-

fendants in both cases seek summary judgment on the alternative ground that their actions were not willful as a matter of law. To address this last contention, we must define the meaning of the term "willfully" as it applies in FCRA.

A. Reynolds v. Hartford Financial Services Group, Inc.

Jason Reynolds is the sole remaining named-plaintiff in this class action against Hartford Fire Insurance Company ("Hartford Fire").[3] He seeks statutory and punitive damages, as well as reasonable attorneys fees for the company's violation of FCRA's adverse action notice requirement. Reynolds' claims relate to two insurance policies he obtained, one for automobile and the other for homeowners insurance. On the record before us, Hartford Fire set the rates to be charged for both policies. Hartford Property and Casualty Insurance Company of Hartford ("PCIC Hartford") issued Reynolds the homeowners insurance policy and Hartford Insurance Company of the Midwest ("Hartford Midwest") issued him the automobile insurance policy. We refer to Hartford Fire, Hartford PCIC, and Hartford Midwest as the "Hartford Companies."

Reynolds originally sued Hartford Fire and later sought to amend his complaint to add PCIC Hartford and Hartford Midwest.[4] Hartford Fire sought summary judgment, which the district court granted on two grounds. First, it held that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Second, and in the alternative, it held that an insurance company that issues a policy to a new policy-holder "cannot [be held to] 'increase' a charge

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[3] Rausch is no longer pursuing his appeal.

[4] Reynolds also named Hartford Financial Services Group, Inc., which serves as a holding company, but is not pursuing his claims against that entity.

for insurance unless the insurer makes an initial demand for payment of the insured and subsequently increases the amount of that demand based on information in the insured's credit report." The second and alternative holding relies on a previous decision by the same court, *Mark v. Valley Insurance Co.*, 275 F.Supp.2d 1307, 1317 (D.Or.2003). On the basis of that earlier decision, the district court also denied Reynolds leave to amend, reasoning that he could not "state viable FCRA claims against the proposed defendants," PCIC Hartford and Hartford Midwest. In other words, leave was denied on the ground that the policies were initial issues and no previous charge had been made to the customer at a lower rate.

The Hartford Companies' Use of Credit Information

During the relevant time period, Hartford Fire and the American Association of Retired Persons ("AARP") had an agreement under which Hartford Fire or one of its subsidiaries would issue automobile and homeowners insurance to AARP members at a premium rate if those individuals enjoyed favorable credit ratings. While the procedures used for issuing the two kinds of insurance varied slightly, they were the same in most relevant respects. In both cases, employees of Hartford Fire would make all of the decisions concerning AARP members' insurance policies for all of its subsidiaries, including Hartford Midwest, which issued automobile insurance, and PCIC Hartford, which issued homeowners insurance. In doing so, Hartford Fire's employees would obtain credit information from Trans Union, a consumer information bureau, through a contract to which Hartford Fire and Trans Union were signatories. This information would be conveyed to Hartford Fire through the risk assessment and data supply firm, ChoicePoint, in the form of an "insurance score." High insurance scores correlated with more favorable credit reports. With regard to automobile insurance, if an AARP member had a high enough insurance score, he would qualify for a ten percent discount. With regard to homeowners insurance, only if the member obtained a

top insurance score could he be assigned to the top tier of insurance with the best rate.

If, when Hartford Fire sent a request for an insurance score, no credit information matched the name and address of the consumer or if the information that did match was insufficient to generate an insurance score, this information would be transmitted to the company, and the consumer would be labeled a "no hit" or a "no score" and would not be assigned an insurance score. Without an insurance score, the consumer could not qualify for the ten percent discount with Hartford Midwest, nor could he be placed in the top insurance tier with PCIC Hartford. As a result, a "no hit" or "no score" consumer would in numerous instances pay more for insurance than if he had received a high insurance score.[5]

The Hartford Companies' Adverse Action Policy

Hartford Fire is the only one of the Hartford Companies to have developed or sent adverse action notices. The parties dispute whether Hartford Fire actually sent an adverse action notice to Reynolds, but that is a question of fact for the factfinder. Whether the notice Hartford Fire contends it sent was adequate under FCRA is a question of law that we discuss below.

Reynolds' Insurance Policies

Reynolds applied for both automobile and homeowners insurance by contacting the Hartford Companies. He had no existing policy with that group. An employee of Hartford Fire collected personal information and attempted to obtain Reynold's insurance score twice, once for each in-

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[5] In connection with Reynolds' request for automobile insurance, he was labeled a "no hit" because his name and address did not match any person's in the national database. In connection with his homeowners insurance request, he was labeled a "no score" because, while his name and address did call up information in the database, the information was insufficient to generate an insurance score. As both a label of "no hit" and "no score" have the same practical effect, for convenience's sake we will hereafter refer in this opinion to a report in either category as a "no hit."

surance application. The credit bureau reported both times that Reynolds was a "no hit." *See* n.5, *supra*. Although Hartford Midwest issued him an automobile insurance policy and Hartford PCIC issued him a homeowners insurance policy, as a result of his "no hit" status Reynolds did not receive either of the AARP premium rates.

B. Edo v. GEICO Casualty Co.

The second of the consolidated cases relates to an automobile insurance policy obtained by Ajene Edo. Like Reynolds, Edo seeks statutory and punitive damages, as well as reasonable attorney fees, on behalf of a class of consumers for violation of FCRA's adverse action notice requirement. He, too, is the sole remaining named-plaintiff. Edo appeals the district court's grant of summary judgment to defendants Government Employees Insurance Company ("Government Employees"), GEICO General Insurance Company ("GEICO General"), and GEICO Indemnity Corporation ("GEICO Indemnity").[6] These are affiliated companies, all of which are subsidiaries of the GEICO Corporation and are referred to collectively by the parties as the "GEICO Companies." We sometimes refer to that group of companies by that designation and sometimes simply as GEICO.

Unlike Hartford Fire, the GEICO Companies concede that adverse actions can occur with respect to the first rates charged in an initial policy of insurance. They do not assert that in order for an adverse action to occur there must be an increase to a rate that the consumer has previously been charged. Nevertheless, the district court granted summary judgment with respect to the various GEICO entities on a number of different grounds. First, the court held that Edo did not have standing to bring a

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[6] Edo is not pursuing his appeal against GEICO Casualty Corporation ("GEICO Casualty"), a company that writes insurance policies for high risk consumers and charges the highest rates. GEICO Casualty did not issue a policy of insurance to Edo, and Edo did not seek to obtain a policy at the unfavorable rates the company charged.

FCRA claim against Government Employees because he "was not eligible for insurance coverage from [that company] regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel." Next, it granted summary judgment in favor of GEICO General because that company "did not contract with Plaintiff to issue or to underwrite an insurance policy." This ruling was in accord with the district court's previous holdings in other related cases that only the company that issues the insurance policy can be held to have taken an adverse action under FCRA. *See Ashby v. Farmers Group, Inc.*, 261 F.Supp.2d 1213, 1222 (D.Or.2003); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F.Supp.2d 977, 989-90 (D.Or.2003). Finally, it granted summary judgment to GEICO Indemnity because "the premium charged to [Edo] by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."

GEICO's Use of Credit Information

The GEICO Companies are organized by risk. GEICO General provides preferred policies with low rates for those who are lesser insurance risks. Government Employees also provides preferred policies, but only to government employees. GEICO Indemnity issues standard policies with mid-level rates for moderate risk consumers. Finally, GEICO Casualty issues non-standard policies with high rates for those who are greater risks. The GEICO Companies began using consumer credit reports in early 1999.

In order to purchase insurance, consumers call a toll-free number and talk to a GEICO sales counselor. The sales counselor is employed by Government Employees but works on behalf of all of the GEICO Companies. Indeed, all of the work of the GEICO Companies is performed by Government Employees workers, as the other companies do not have any employees. Upon learning that a customer wishes to purchase automobile insurance, the sales counselor elicits basic information and asks

whether he may use the customer's credit information when arranging for his policy. If the customer acquiesces, the sales counselor obtains the credit information in the form of an insurance score calculated by the data analysis firm Fair Isaacs from information supplied by Trans Union. Government Employees is the only GEICO company that has a contract with Trans Union and Fair Isaacs to provide this information. Using a Government Employees computer system, the sales counselor converts the insurance score to a credit weight and combines it with other weights assigned to other insurance factors, such as age and number of accidents to arrive at a final total insurance weight. Based on that final weight, the sales counselor assigns the customer to one of the GEICO Companies and determines the appropriate insurance tier. This determination serves to establish the rate the consumer will be charged. After the information the customer has provided has been verified, he is issued an insurance policy at that rate.

GEICO's Adverse Action Policy

The GEICO Companies' original FCRA policy, adopted in 1999, was to send adverse action notices to all consumers whose credit reports were used in making insurance decisions. Later that same year, GEICO changed its policy, at least in part to reduce costs. Instead of sending adverse action notices to everyone, GEICO developed a system for determining which actions it deemed adverse by comparing the rate charged to the rate that it would have charged had the credit information been "neutral."

GEICO's new system, however, did not comply with FCRA's requirements. The GEICO Companies' policy during the period relevant to this case was to compare the consumer's actual company and tier placement (which, as described above, was based in part on his credit rating) with the company and tier to which he would have been assigned had a "neutral" credit weight been substituted for his actual credit weight when calculating the final total insurance weight. The GEICO Companies' "neutral" credit weight was defined, generally speaking, as the

weight that reflected the average credit rating of all consumers. The GEICO Companies would calculate two final total insurance weights, using only one variable – the actual credit weight in one case, and the "neutral" credit weight in the other. Only if the final total insurance weight using the "neutral" credit weight would have resulted in the consumer's placement with a different company or in a different tier than that to which the consumer was actually assigned, and only if such different placement would have resulted in the consumer's being charged a lower rate, would GEICO Companies issue an adverse action notice. In other words, the GEICO Companies' policy was to refrain from sending a statutory notice if use of the consumer's actual credit information caused the applicant to be placed with an entity and in a tier that resulted in the charging of the same or a lower rate than the rate that he would have been charged had the calculation and the ensuing assignment been based on a "neutral" or average credit rating. Under this policy, even if the rate ultimately charged was higher than the rate to which the consumer would have been entitled had he had a more favorable credit rating, the statutory notice was not sent if use of the "neutral" and the actual credit data would have led to an assignment to the same entity and tier. Thus, it was not GEICO's policy to send adverse action notices to all consumers who would have been charged lower rates had they enjoyed a more favorable credit rating.

Edo's Insurance Application

Following Edo's call to GEICO's toll-free number, the sales counselor used the credit information he obtained to place its new customer with GEICO Indemnity. The GEICO Companies then applied its policy for determining whether an adverse action had occurred. GEICO calculated that, had the neutral credit weight been used instead of Edo's actual credit weight, the resulting final total weight would still have resulted in Edo's being placed with GEICO Indemnity. That Edo's placement, and the rate charged for his insurance, did not improve when the

"neutral" weight was used is not surprising, as Edo's actual credit weight was better than average. Under its policy, however, the GEICO Companies did not issue him an adverse action notice.

It is uncontested that if the GEICO Companies had used the highest credit weight that a consumer could receive rather than the neutral credit rate to determine Edo's alternate placement, GEICO would have placed Edo with GEICO General, a preferred company, and offered him a lower insurance rate. In short, if Edo's credit information had been more favorable (even though it was already above average), he would have been charged less for his insurance. In 2002, the GEICO Companies changed its policy and began to issue adverse action notices whenever a report with more favorable credit information would have resulted in a lower insurance rate. Under the new policy, Edo would have received the statutory notice.

II. ANALYSIS

A. Initial Policies of Insurance

The principal question in this and a number of related cases[7] constitutes a matter of first impression: Does FCRA's adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an increase in a rate that the consumer has previously been charged? As with all statutory interpretation, we begin with the text of the statute. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). An adverse action with respect to insurance is defined by 15 U.S.C. § 1681a(k)(1)(B)(i) as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

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[7] The related cases are resolved by memoranda of disposition filed concurrently herewith.

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford, refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor – such as adverse credit information, age, or driving record[8] – regardless of whether the customer was previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

"Increase" means to make something greater. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) (defining "increase" as "growth, enlargement,

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[8] An adverse action under FCRA can, of course, only occur if the increase in charge was due to "information contained in a consumer report." 15 U.S.C. § 1681m(a). The consumer reports at issue in these cases are credit reports. While increases in charges may occur because of many factors, plaintiffs contest only the increases due to unfavorable credit information.

etc[.]"). "Charge" means the price demanded for goods or services. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers [the Truth in Lending Act's] disclosure requirements." *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir.2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

Second, the statutory definition of "adverse action," as it is made applicable to insurance, explicitly encompasses "*any* insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Congress' use of the latter phrase demonstrates its intent that "adverse actions" apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy. The text of the statute does not permit the imposition of any temporal limitation. Hartford has suggested no sensible alternative reading of "existing or applied for." Thus, reading the terms "increase" and "charge" in the context of the provision as a whole, particularly the "existing or applied for" phrase, supports affording them their ordinary meaning.

Third, our interpretation of the terms at issue best comports with the stated purpose of FCRA: to ensure the

"[a]ccuracy and fairness of credit reporting." 15 U.S.C. § 1681. FCRA's adverse action notice requirement is an important tool that Congress created, using broad, encompassing language. Through this requirement, Congress sought to promote the rights of consumers by giving them essential information about how their credit report is used, information that they could obtain in no other way. The information Congress mandated serves two important ends. First and foremost, once consumers possess this information they can check and correct any errors in their credit reports. This increases the chances that a consumer's financial stability will not be hampered by faulty credit information. It also improves the overall accuracy of credit reports, which facilitates the operation of our markets. Second, even when credit reports are accurate, informing consumers when their credit rating is hurting them in the marketplace gives them important information about the benefits of improving their credit rating in the future and may even assist them in learning how to do so.

Hartford Fire's contention that FCRA does not apply to the rate charged in initial insurance policies would seriously undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir.1995). While our interpretation is the plain one, this canon supports our result.

We hold that whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA. Therefore, the fact that Reynolds' policy was an initial one, and his rate

was the initial rate charged, is of no consequence. Reynolds' rate was increased above that which it would have otherwise been because of his credit report. As the statute's text is clear, we need not resort to either the agency's interpretations[9] or the statute's legislative history. The district court erred in granting summary judgment to Hartford Fire on the ground that FCRA does not apply to the rate first charged in an initial policy.[10]

B. What Constitutes An Adverse Action

The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-

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[9] We note that our holding is consistent with the Federal Trade Commission's interpretation of the statute. Because we find FCRA unambiguous, however, we reach our decision independently of, and do not defer to, the agency's interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[10] Although our discussion has principally related to initial insurance policies, our interpretation of "increase in any charge" is obviously not limited to a consumer's first policy. As we have explained, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price. This definition applies equally to initial issues, amendments, and renewals of insurance policies.

average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.

FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him.[11] Such is the case with Edo. Because Edo would have been placed with GEICO General instead of GEICO Indemnity and thus would have been charged a lower rate if his credit rating had been higher, an adverse action occurred and an adverse action notice was required under FCRA.[12] Under the GEICO formula, the fact that the credit rating Edo actually received was higher than the average rating did not mean that Edo would not be charged a higher rate

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[11] We note that the statute does not require an insurance company to issue an adverse action notice simply because a consumer does not get the best possible rate. If a better credit report would not have reduced the consumer's insurance rate, his credit report is not the cause of the higher price and therefore no adverse action based on a credit report has occurred.

[12] Making a slightly different argument, at least rhetorically, the GEICO Companies also argue that the action they took against Edo was not adverse because he was placed in the same company that he would have been placed in had his credit information not been used. While this is a true statement, it is only so because if the consumer refuses to allow his credit information to be used, the sales counselor assigns the consumer the "neutral" credit weight. Therefore, the GEICO Companies' argument that the action was not adverse because it was the same as if no credit information had been used is functionally identical to its argument that the action was not adverse because it was not detrimental when compared to the result using a "neutral" credit rating. Thus, this argument fails as well.

than he would have been charged had he had an even better credit report, but it ensured that he would not receive an adverse action notice when he was charged that increased rate. The district court erred in granting GEICO Indemnity summary judgment on the ground that Edo's rate was not increased on the basis of his credit report.

C. "No Hit" Adverse Actions

Hartford Fire makes a separate argument as to why in Reynolds' case no adverse action was taken. Specifically, the company argues that no adverse action was taken against Reynolds "based in whole or in part on any information contained in a consumer report" within the meaning of 15 U.S.C. § 1681m(a). When Hartford Fire requested credit information about Reynolds, Trans Union did not possess the necessary information to generate an insurance score and transmitted this finding to the insurer. Reynolds was therefore considered a "no hit." *See* n.5, *supra*. Because he was so designated, Reynolds was rendered ineligible for the premium rates available to AARP members with qualifying credit ratings, and, as a result, was charged a higher rate in his initial policies. Hartford Fire argues, however, that these were not adverse actions because, it contends, an "adverse action" occurs only if it is based on "information contained in a consumer report" and no such report was received with respect to Reynolds. We reject Hartford Fire's argument.

FCRA's definition of "consumer report" is broad. It unquestionably encompasses a credit reporting agency's communication to an insurance company that a consumer does not have enough information on file for an insurance score to be calculated. Specifically, 15 U.S.C. § 1681a(d)(1) explains that "[t]he term 'consumer report' means any written, oral, or other communication of *any information* by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . ." (emphasis added).

Reporting that an agency cannot obtain any information regarding a consumer or that a consumer has insufficient

credit information on file conveys a message regarding the consumer's creditworthiness, standing, and capacity that makes his obtaining of credit far more difficult. Such a report suggests that the consumer cannot show that he pays debts in a timely manner. That information may be false: The credit agency may have used the wrong name or searched the wrong records, missing data that would have shown that the applicant is indeed creditworthy. Providing notice therefore serves the statutory purpose of allowing the consumer to correct errors in credit reports. Accordingly, we hold that a communication that a consumer has no information available or an insufficient credit history to permit the calculation of a credit rating qualifies as "a consumer report" within the meaning of FCRA. Because it is uncontested that Reynolds would have been charged lower insurance rates had he received qualifying credit ratings and because the application of the "no hit" rule precluded him from receiving such ratings, we hold that an adverse action was taken against him on the basis of information contained in a credit report. Accordingly, the district court's order of summary judgment may not be affirmed on the ground that its actions with respect to Reynolds were not based on such information.

D. Adequacy Of The Notice

Hartford Fire also urges us to affirm the district court's grant of summary judgment on the alternative ground that, although (in its view) it was not required under FCRA to send adverse action notices, the notices that the Hartford Companies did send were sufficient to meet its FCRA responsibilities. We reject this argument because the notices were inadequate as a matter of law. Under 15 U.S.C. § 1681m(a)(1), a company that takes adverse action on the basis of a consumer report must "provide oral, written, or electronic notice of the adverse action to the consumer" as well as meet a number of other specific re-

quirements.[13] While the term "notice of an adverse action" is not defined in the statute, we hold that, at a minimum, such a notice must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.[14] *See Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir.1983) (requiring disclosure of "reliance on data contained in [a consumer's] credit report" when providing notice of an adverse action).

The notices Reynolds received did not comply with any of the above requirements. They did not tell him that any adverse action had been taken against him. They simply stated that "[t]he Hartford's eligibility and pricing decisions are based in part on consumer report(s) from a consumer reporting agency" and allowed him to make a written request in order to find out more. Reynolds was entitled to be informed that his rate for insurance was increased because of information in his credit report. He was also entitled to be told that Hartford Fire made the pricing decision and that Hartford PCIC and Hartford Midwest issued him policies at those higher rates. FCRA recognizes the difference between telling a consumer that his credit information *could* affect his insurance rate and that it *did* adversely affect his rate, and requires notice of the latter. We therefore reject Hartford Fire's alternative argument for upholding the district court's order.

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[13] The notice must also contain information regarding the consumer reporting agency. It must provide the name, address, and telephone number of the agency that provided the report, a statement that the agency did not make the adverse decision and is not able to explain it to the consumer, a statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the agency, and a statement setting forth the consumer's right to dispute directly with the agency the accuracy or completeness of any information in the report. *See* 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. § 698, App. H.

[14] We do not decide whether a fuller description of what specific information was adverse is required as this question is not before us.

E. Who Is Liable

The defendants all contend that only one company can be liable when an insurance policy contains an increase in rates – the issuing company. The plain text of the statute, as well as its purposes, are to the contrary. Here, we hold that all of the defendants are potentially liable under the statute.

FCRA requires that "any person" who takes an adverse action is liable. 15 U.S.C. § 1681m(a). The definition of "any" includes the plural. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("one, a, an, or some; one or more without specification or identification"). With regard to insurance transactions, liability attaches whenever an adverse action is taken "in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). This broad "in connection with" language confirms that a variety of entities may be liable. No provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance. Therefore, the defendants find themselves in the difficult position of persuading us that Congress intended something different from what it wrote. We analyze their three arguments separately.

First, GEICO argues that the words "applied for" in the definition of adverse action, § 1681a(k)(1)(B)(i), demonstrate that only the issuing company is liable under the statute. On that basis, GEICO asks us to hold that Edo "applied for" insurance only with GEICO Indemnity because that was the company that issued him a policy. The argument is frivolous, both factually and legally. As a matter of fact, Edo did not apply to one company but instead requested insurance from the GEICO family of companies. He did not specifically ask to be placed with GEICO Indemnity, and the GEICO Companies did not interpret his telephone call as requesting a policy with that company in particular, as evidenced by the evaluation by Government Employees of his eligibility for a pol-

icy from several of the GEICO affiliates. That he was placed with GEICO Indemnity and not another GEICO entity was the result of a decision made by Government Employees personnel, not the result of a limited application by Edo. Thus, GEICO's argument has no basis in fact. Furthermore, as a matter of law, we refuse to turn the words "applied for" into a legal term of art that refers only to the issuing company. The clearest indication that Congress did not intend the words "applied for" to be used in such an unusual manner is that this interpretation would eliminate all potential FCRA liability for denials of insurance. No one disputes that FCRA defines the term adverse action to include denials. 15 U.S.C. § 1681a(k)(1)(B)(i). However, under GEICO's interpretation, because a consumer has not "applied for" insurance unless a policy has been issued and because a company that denies insurance has not, by definition, issued a policy, adverse action notices would never be required for denials of insurance. This is manifestly contrary to the statute, as it would eliminate from its coverage an important set of actions that Congress clearly intended to subject to FCRA's requirements.

Second, all the defendants argue that "*takes* any adverse action" limits FCRA's adverse action notice requirement to companies that actually issue an insurance policy. We find no such limitation in the statute by virtue of Congress's use of the word "takes" or otherwise. 15 U.S.C. § 1681m(a). To the contrary, adverse action is defined far more broadly than just "issuance." 15 U.S.C. § 1681a(k). The statutory definition specifically includes denials and cancellations as well as increases in rates, and other unfavorable changes, whenever and by whomever made. The word "takes" neither adds to nor detracts from that definition. It describes the act of engaging in the conduct that gives rise to the notice requirement. As discussed below, all of the companies at issue here took "adverse actions," as that term is defined in the statute.

Third and finally, all the defendants argue that we should hold liable only the issuing company because hold-

ing several companies liable for FCRA violations arising out of the issuance or denial of a single application will result in multiple, confusing adverse action notices, which would thwart rather than further FCRA's purpose. Such is not the case. Joint and several liability simply imposes the obligation on all of the affiliated companies responsible for taking an adverse action to ensure that the affected consumer receives a statutory notice describing the adverse affect of his credit report within that family of companies. Multiple notices are not required; a single notice from the companies involved identifying those companies and their respective roles will suffice.

Holding all the companies that take adverse action against a consumer jointly responsible for issuing a notice furthers FCRA's objectives. For example, joint responsibility substantially increases the prospect that an adverse action notice will be sent and that a customer who seeks to obtain insurance from a group of affiliated companies will be informed as to the manner in which his credit information adversely affected him. By imposing joint and several liability, Congress also improved the quality of information consumers receive, because each of the companies that takes an adverse action against the consumer must say so in the notice. We doubt that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure. By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy.

On the basis of the record before us all three GEICO Companies and Hartford Fire may be held liable under FCRA, as may the two other Hartford entities as to which leave to amend was denied.[15] Two of the GEICO Compa-

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[15] While the parties do not agree on every issue of fact, we hold that on the record before us there is no issue of material fact as to whether (1) Government Employees and Hartford Fire made the decisions that

nies, working together, are responsible for increasing Edo's charge for insurance: Government Employees, which made the decision as to which of the GEICO family of companies would issue the insurance to Edo and, in so doing, determined that he would be charged at an increased rate, and GEICO Indemnity, which then issued the insurance policy at that increased rate. GEICO General is responsible because it denied Edo insurance for the reason that his credit rating was not sufficiently high. Hartford Fire, like Government Employees, made the critical rate-to-be-charged decision. It determined that, on the basis of Reynolds' credit report, he was not eligible for the lower rates afforded by its affiliates to the qualifying AARP members and that he would be charged for his insurance at a higher rate. Hartford Fire may therefore be held liable for increasing Reynolds' charges for insurance on the basis of his credit rating. Hartford PCIC and Hartford Midwest issued the policies to Reynolds at the increased rates determined by Hartford Fire, and may, accordingly, be held liable as well.

In sum, Government Employees, GEICO General, and GEICO Indemnity may be held jointly and severally liable for failing to issue an adverse action notice to Edo. Likewise, Hartford Fire may be held liable for failing to issue a notice to Reynolds, and Reynolds may also properly state claims against Hartford PCIC and Hartford Midwest. Thus, Reynolds should be permitted to amend his claims on remand.

F. Meaning Of Willfully

Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in

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increased Edo's and Reynolds' rates, respectively. (2) GEICO General denied Edo a policy, and (3) GEICO Indemnity issued Edo a policy at an increased rate. All of these actions were taken by the companies involved and all constituted "adverse actions" within the meaning of FCRA.

FCRA.[16] Interestingly, there is no legislative history to explain what Congress intended by the use of that term.

We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." *See Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir.2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir.2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir.2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir.1998); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997). An act that is merely negligent is not willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) ("The word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."). Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive." *See, e.g., Dalton*, 257 F.3d at 418 (holding that a plaintiff need not show malice or evil motive); *Cousin*, 246 F.3d at 372 (same); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir.1998); *Cushman*, 115 F.3d at 226 (same). *But see Duncan*, 149 F.3d at 429 (requiring "'a motivation to injure'"). In this respect, for purposes of willfulness we distinguish civil from criminal liability. *See Bryan v. United States*, 524 U.S. 184, 191, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) ("Most obviously [willfulness] differentiates between deliberate and unwitting conduct, but *in the criminal law* it also typically refers to a culpable state of mind." (emphasis added)).

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[16] "Any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. 15 U.S.C. § 1681n (emphasis added).

Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Cushman*, 115 F.3d at 227. We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (quoting *Thurston* and holding that, for an alleged civil violation of the Age Discrimination in Employment Act (ADEA), "willful" requires only a "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA'"); *McLaughlin*, 486 U.S. at 134 n.13, 108 S.Ct. 1677 (using the *Thurston* definition of "willful" in interpreting the Fair Labor Standards Act); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43, 58 S.Ct. 533, 82 L.Ed. 773 (1938) (holding civil defendant's failure to unload a cattle car was "willful" because it showed a disregard for governing statute and an indifference to its requirements). The Court's rule with respect to civil cases differs from its rule in criminal proceedings. In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute. *See Bryan*, 524 U.S. at 196, 118 S.Ct. 1939 (requiring "knowledge that the conduct is unlawful" in a criminal case); *Ratzlaf v. United States*, 510 U.S. 135, 149, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (requiring proof that the criminal defendant "knew the structuring [of financial transactions] in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S.

192, 201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (requiring proof that a criminal "defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").[17]

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless dis-

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[17] The Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law. *Phillips*, 312 F.3d at 370 ("[W]ilful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law."). The Sixth Circuit has implied that actual knowledge is necessary. *Duncan*, 149 F.3d at 429 (suggesting that an actual belief of legality suffices to defeat willfulness liability under FCRA). The Eighth and Sixth Circuits, however, ignore *Thurston* and the cases that follow its reasoning.

regard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

Where, as here, at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive. *See Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 645 (9th Cir.1993); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 409 (5th Cir.1989) (stating that "seeking legal advice [does not] ipso facto establish[] the appropriate intent [willfulness]"). Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel. Because the parties did not have an adequate opportunity to explore the issue in the district court, we remand for further proceedings.

III. CONCLUSION

In conclusion, we hold that FCRA applies, *inter alia*, to the first rates charged in initial insurance policies. We also hold that FCRA requires insurance companies to send adverse action notices whenever they charge a higher rate for insurance, in initial policies or otherwise, because of the consumer's credit information, not simply when the consumer's credit rating is below average. Fur-

thermore, we hold that a communication that there is a lack of sufficient credit information regarding a consumer is a credit report within the meaning of FCRA. In addition, we hold that adverse action notices must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. With respect to which companies in a group may be liable under FCRA, we hold that a company that makes the rate-setting decision, a company that issues the insurance policy, and any company that denies insurance at a more favorable rate may be held jointly and severally liable, and that such companies may provide a single adverse action notice to consumers containing all of the requisite information. Finally, we adopt the Third Circuit's definition of "willfully": Reckless disregard is sufficient.

As a consequence of these rulings, we hold that the district court erred in granting summary judgment to Hartford Fire on the basis that increased charges for insurance in an initial policy do not constitute adverse actions, and in denying Reynold's request for leave to amend his complaint to add Hartford PCIC and Hartford Midwest for that same reason. Likewise, we hold that the district court erred in granting summary judgment to GEICO Indemnity on the basis that the actions it took were not adverse and granting summary judgment to Hartford Fire, Government Employees, and GEICO General on the basis that only the issuer of insurance can be liable under FCRA. Next, we hold that summary judgment may not be granted on the alternative grounds that a transmission that a consumer has insufficient credit information to generate a score is not a credit report, or that Hartford Fire's adverse action notices were sufficient. In sum, we reverse the district court's grant of summary judgment with respect to all defendants in both *Edo* and *Reynolds*, reverse its denial of Reynolds' request to amend his complaint to add Hartford PCIC and Hartford Midwest, and

remand to the district court for further proceedings consistent with this opinion.[18]

REVERSED and REMANDED.

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[18] We note that on appeal, plaintiffs seek only a reversal of the grant of summary judgment to defendants, and do not request such a judgment on their own behalf. Although "a court has the power sua sponte to grant summary judgment to a non-movant when there has been a motion but no cross-motion," we decline to do so here. *Kassbaum v. Steppenwolf Prod., Inc.*, 236 F.3d 487, 494 (9th Cir.2000).

STATUTORY PROVISIONS INVOLVED

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, provides in relevant part:

15 U.S.C. § 1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer Report. –

(1) In general. – The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for –

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) Exclusions. – Except as provided in paragraph (3), the term "consumer report" does not include –

(A) subject to section 1681s-3 of this title, any –

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (o) or (x) of this section.

(3) Restriction on sharing of medical information. – Except for information or any communication of information disclosed as provided in section 1681b(g)(3) of this title, the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is –

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) Medical Information. – The term "medical information" –

(1) means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to –

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the payment for the provision of health care to an individual.

(2) does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(j) Definitions Relating to Child Support Obligations.

(1) Overdue support.

The term "overdue support" has the meaning given to such term in section 666(e) of title 42.

(2) State or local child support enforcement agency.

The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse Action. –

(1) Actions included. – The term "adverse action" –

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means –

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is –

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) Applicable findings, decisions, commentary, and orders. – For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

***(l)* Firm Offer of Credit or Insurance.** – The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established –

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification –

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was –

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) Credit or Insurance Transaction That Is Not Initiated by the Consumer. – The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of –

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) State. – The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(o) Excluded Communications. – A communication is described in this subsection if it is a communication –

(1) that, but for subsection (d)(2)(D) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of –

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and

(5) with respect to which –

(A) the consumer who is the subject of the communication –

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication –

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which anaction is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) Consumer Reporting Agency That Compiles and Maintains Files on Consumers on a Nationwide Basis. – The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nationwide:

(1) Public record information.

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

(q) Definitions Relating to Fraud Alerts –

(1) Active duty military consumer. – The term "active duty military consumer" means a consumer in military service who –

(A) is on active duty (as defined in section 101(d)(1) of title 10) or is a reservist performing duty under a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10; and

(B) is assigned to service away from the usual duty station of the consumer.

(2) Fraud alert; active duty alert. – The terms "fraud alert" and "active duty alert" mean a statement in the file of a consumer that –

(A) notifies all prospective users of a consumer report relating to the consumer that the consumer may be a victim of fraud, including identity theft, or is an active duty military consumer, as applicable; and

(B) is presented in a manner that facilitates a clear and conspicuous view of the statement described in subparagraph (A) by any person requesting such consumer report.

(3) Identity theft. – The term "identity theft" means a fraud committed using the identifying information of another person, subject to such further definition as the Commission may prescribe, by regulation.

(4) Identity theft report. – The term "identity theft report" has the meaning given that term by rule of the Commission, and means, at a minimum, a report –

(A) that alleges an identity theft;

(B) that is a copy of an official, valid report filed by a consumer with an appropriate Federal, State, or local law enforcement agency, including the United States Postal Inspection Service, or such other government agency deemed appropriate by the Commission; and

(C) the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information if, in fact, the information in the report is false.

(5) New credit plan. – The term "new credit plan" means a new account under an open end credit plan (as defined in section 1602(i) of this title) or a new credit transaction not under an open end credit plan.

(r) Credit and Debit Related Terms –

(1) Card issuer. – The term "card issuer" means –

(A) a credit card issuer, in the case of a credit card; and

(B) a debit card issuer, in the case of a debit card.

(2) Credit card. – The term "credit card" has the same meaning as in section 1602 of this title.

(3) Debit card. – The term "debit card" means any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of the consumer at such financial institution, for the purpose of transferring money between accounts or obtaining money, property, labor, or services.

(4) Account and electronic fund transfer. – The terms "account" and "electronic fund transfer" have the same meanings as in section 1693a of this title.

(5) Credit and creditor. – The terms "credit" and "creditor" have the same meanings as in section 1691a of this title.

(s) Federal Banking Agency. – The term "Federal banking agency" has the same meaning as in section 1813 of title 12.

(t) Financial Institution. – The term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 461(b) of title 12) belonging to a consumer.

(u) Reseller. – The term "reseller" means a consumer reporting agency that –

(1) assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and

(2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.

(v) Commission. – The term "Commission" means the Federal Trade Commission.

(w) Nationwide Specialty Consumer Reporting Agency. – The term "nationwide specialty consumer reporting agency" means a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to –

(1) medical records or payments;

(2) residential or tenant history;

(3) check writing history;

(4) employment history; or

(5) insurance claims.

(x) Exclusion of Certain Communications for Employee Investigations –

(1) Communications described in this subsection. – A communication is described in this subsection if –

(A) but for subsection (d)(2)(D) of this section, the communication would be a consumer report;

(B) the communication is made to an employer in connection with an investigation of –

(i) suspected misconduct relating to employment; or

(ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory or-

ganization, or any preexisting written policies of the employer;

(C) the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and

(D) the communication is not provided to any person except –

(i) to the employer or an agent of the employer;

(ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;

(iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;

(iv) as otherwise required by law; or

(v) pursuant to section 1681f of this title.

(2) Subsequent disclosure. – After taking any adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) of this section an investigative consumer report need not be disclosed.

(3) Self-regulatory organization defined. – For purposes of this subsection, the term "self-regulatory organization" includes any self-regulatory organization (as defined in section 78c(a)(26) of this title), any entity established under title I of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7211 et seq.], any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with such Commission.

15 U.S.C. § 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall –

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically –

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right –

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies

(1) In general. – Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate. –

(A) Duties, generally. – If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall –

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described. – An action referred to in subparagraph (A) is an adverse action described in

section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1681a(k)(1)(B) of this title.

(C) Information described. – Information referred to in subparagraph (A) —

(i) except as provided in clause (ii), is information that –

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include –

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on basis of information contained in consumer files

(1) In general. – Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section

1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that –

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

(2) Disclosure of address and telephone number; format. – A statement under paragraph (1) shall –

(A) include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title; and

(B) be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration.

(3) Maintaining criteria on file. – A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected. – This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

(e) Red flag guidelines and regulations required

(1) Guidelines. – The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title –

(A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary;

(B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers

or to the safety and soundness of the institution or customers; and

(C) prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures –

(i) notifies the cardholder of the request at the former address of the cardholder and provides to the cardholder a means of promptly reporting incorrect address changes;

(ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or

(iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(2) Criteria

(A) In general. – In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.

(B) Inactive accounts. – In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies

and procedures that provide for notice to be given to a consumer in a manner reasonably designed to reduce the likelihood of identity theft with respect to such account.

(3) Consistency with verification requirements. – Guidelines established pursuant to paragraph (1) shall not be inconsistent with the policies and procedures required under section 5318(l) of title 31.

(f) Prohibition on sale or transfer of debt caused by identity theft

(1) In general. – No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 1681c-2 of this title has resulted from identity theft.

(2) Applicability. – The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).

(3) Rule of construction. – Nothing in this subsection shall be construed to prohibit –

(A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;

(B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or

(C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.

(g) Debt collector communications concerning identity theft

If a person acting as a debt collector (as that term is defined in subchapter V of this chapter) on behalf of a third party that is a creditor or other user of a consumer report is notified that any information relating to a debt that the

person is attempting to collect may be fraudulent or may be the result of identity theft, that person shall –

(1) notify the third party that the information may be fraudulent or may be the result of identity theft; and

(2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.

(h) Duties of users in certain credit transactions

(1) In general. – Subject to rules prescribed as provided in paragraph (6), if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with this subsection.

(2) Timing. – The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).

(3) Exceptions. – No notice shall be required from a person under this subsection if –

(A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or

(B) the person has provided or will provide a notice to the consumer under subsection (a) of this section in connection with the transaction.

(4) Other notice not sufficient. – A person that is required to provide a notice under subsection (a) of this section cannot meet that requirement by providing a notice under this subsection.

(5) Content and delivery of notice. – A notice under this subsection shall, at a minimum –

(A) include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report;

(B) identify the consumer reporting agency furnishing the report;

(C) include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge; and

(D) include the contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in section 1681a(p) of this title).

(6) Rulemaking

(A) Rules required. – The Commission and the Board shall jointly prescribe rules.

(B) Content. – Rules required by subparagraph (A) shall address, but are not limited to –

(i) the form, content, time, and manner of delivery of any notice under this subsection;

(ii) clarification of the meaning of terms used in this subsection, including what credit terms are

material, and when credit terms are materially less favorable;

(iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;

(iv) a model notice that may be used to comply with this subsection; and

(v) the timing of the notice required under paragraph (1), including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.

(7) Compliance. – A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.

(8) Enforcement

(A) No civil actions. – Sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement. – This section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section.

15 U.S.C. § 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the

work expended in responding to the pleading, motion, or other paper.

15 U.S.C. § 1681*o*. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(4) (4) (4) (4)

Nos. 06-82, 06-84, 06-100, 06-101

Supreme Court, U.S.
FILED
AUG 21 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE CO.,
Petitioner,

v.

JASON RAY REYNOLDS,
Respondent.

SAFECO INSURANCE CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.,
Petitioners,

v.

JULIE WILLES,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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August 2006

QUESTIONS PRESENTED

1. Whether petitioners have presented compelling reasons for this Court to review the meaning of the term "willful" in one subsection of the Fair Credit Reporting Act ("FCRA") in cases that are premature for review because (a) these cases are still at an interlocutory stage and were remanded for further proceedings following a reversal of summary judgment, (b) no court has ever examined the evidence of willfulness or applied any "willful" standard to the facts, and (c) there is no factual record of the "advice of counsel" defense that petitioners now raise on remand to refute a finding of willfulness?

2. Assuming that this Court should review at this interlocutory stage in the absence of a complete factual record, whether petitioners have presented compelling reasons for review in the absence of a true circuit split over the meaning of a "willful" violation for the particular subsection 15 U.S.C. § 1681n (a)(1)(A) of the FCRA that is at issue?

3. Whether GEICO, State Farm and Hartford Fire present compelling reasons to review the Ninth Circuit's interpretation of the definition of an "adverse action" and the notice requirements under the FCRA when petitioners fail to identify any conflicts among the circuits over those issues or demonstrate that the Ninth Circuit's analysis of the statutory definition is either incorrect or raises issues of national importance?

PARTIES TO THE COMBINED OPPOSITION

For the Court's convenience, respondents Jason Reynolds, Charles Burr, Shannon Massey, Ajene Edo and Julie Willes file this joint opposition to the petitions for writs of *certiorari* filed respectively by Hartford Fire Insurance Company ("Hartford Fire") (No. 06-82); Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon (collectively, "Safeco") (No. 06-84); GEICO General Insurance Company, GEICO Indemnity, and Government Employees Insurance Company (collectively, "GEICO") (No. 06-100); and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively, "State Farm") (No. 06-101). Respondent Reynolds is the respondent in No. 06-82; respondents Burr and Massey are respondents in No. 06-84; respondent Edo is the respondent in No. 06-100; and respondent Willes is the respondent in No. 06-101. Because petitioners filed separate petitions that raise overlapping issues largely arising out of a single Ninth Circuit opinion, respondents file a single combined opposition.

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INTRODUCTION

The respondents in these cases are individual consumers of automobile and property/casualty insurance who suffered "adverse actions" under the FCRA when the petitioners, various insurance companies, charged them more for insurance or denied them insurance based in part on their credit information. The Ninth Circuit held that petitioners' actions were "adverse actions" within the meaning of FCRA and remanded for further consideration the arguments of certain petitioners that their actions could not be found "willful." The principal argument in these four petitions is that the Ninth Circuit erred in interpreting "willful" to include either knowing or reckless disregard for consumers' rights under the FCRA. Petitioners claim the Ninth Circuit's holding conflicts with the definition of willfulness determined by other circuits. This issue does not merit review for several reasons.

First, review of the willfulness issue by this Court would be premature. These cases arise on summary judgment and the Safeco petition involves a Fed. R. Civ. P. 54(b) interlocutory appeal. Neither the trial court nor the Ninth Circuit has yet examined the evidence to determine whether petitioners acted willfully, either knowingly or recklessly. The Ninth Circuit remanded the case so the district court could examine the evidence. Further, contrary to petitioners' contentions that they have been prevented from or prejudiced in raising the advice of counsel defense, the Ninth Circuit was not presented with an advice of counsel defense, nor did it resolve whether petitioners are entitled to such a defense. The Ninth Circuit's statements concerning the defense are *dicta*. Following remand, petitioners GEICO and Safeco have raised this defense in the trial courts. It would be premature to grant *certiorari* when there is no factual record on advice of counsel and the larger factual issue of willfulness is unresolved.

This is particularly so in a case involving an abstract concept: the meaning of "willfulness." Willfulness is a fact-bound determination not readily explained by labels such as

"reckless disregard" or "conscious disregard." This Court will provide little useful guidance to the lower courts, attorneys, or those regulated by the FCRA if it attempts to apply such labels without a concrete evidentiary record and lower court factual findings. The meaning of a knowing or reckless violation only becomes clear against a well developed record that has been reviewed by a fact-finder and includes any evidence of advice of counsel on which the petitioners may wish to rely. The Ninth Circuit simply remanded the case to the district court to review the facts and provide that record.

Second, there is no square circuit conflict. The FCRA has several different liability sections and subsections. The statutory subsection at issue here, 15 U.S.C. § 1681n (a)(1)(A), merely requires proof of a "willful" violation. The immediately following FCRA subsections expressly require proof of both a willful *and* knowing violation or solely refer to a knowing violation without reference to willfulness. 15 U.S.C. §§ 1681n(a)(1)(B), 1681n(b), and 1681q. Thus, the FCRA's text makes clear that a willful violation is something less than a willful and knowing violation. The claimed circuit split is not a conflict over the interpretation of the text of the particular statutory subsection at issue here. Rather, the cases on which petitioners rely either interpret different statutory subsections, focus on the proof required to establish punitive damages, which are not at issue here, or fail to interpret the particular language of section 1681n(a)(1)(A).

Third, although petitioners assert that the Ninth Circuit's decision will expose them to a flood of litigation over the type of conduct at issue here, there is a serious question whether there is any remaining civil remedy for such violations. In the last two years, eleven different courts, including the Seventh Circuit, have concluded that the 2003 Fair and Accurate Credit Transaction Act (FACTA), which amended the FCRA, eliminated subsection 1681n claims filed after the passage of that Act for violations of section 1681m (the statute at issue here) postdating FACTA. Contrary to petitioners'

unsupported speculation that there has been an explosion in private litigation under the FCRA as a result of the Ninth Circuit's ruling, nearly every court to review the issue has concluded that FACTA prospectively eliminated the civil claims asserted here. The Ninth Circuit's ruling may thus have significance only for the finite class of pre-FACTA claims, obviating the importance of review by this Court.

Finally, petitioners State Farm, GEICO and Hartford Fire raise issues regarding the Ninth Circuit's interpretation of the definition of "adverse action" under the FCRA and its construction of FCRA's notice requirements. These petitioners do not even contend that the Ninth Circuit's routine statutory interpretations conflict with any other circuit precedent or precedent of this Court. The Ninth Circuit's interpretation of the statute is straightforward and correct.

STATEMENT OF THE CASE

I. RESPONDENTS' CLAIMS OF ADVERSE ACTION UNDER THE FCRA

This case involves interpretation of two subsections of the FCRA: 15 U.S.C. §1681n(a)(1)(A), one of the FCRA's several remedy sections, and 15 U.S.C.§ 1681a(k)(1)(B)(i), the definition of an "adverse action" under the FCRA. Respondents assert claims under subsection 1681n(a)(1)(A) for petitioners' failure to give adequate notice that they took "adverse actions" against the consumers, a violation of section 15 U.S.C. § 1681m (a). The insurance companies both denied insurance and increased premiums, "adverse actions" under the FCRA, based on review of the consumers' credit information (typically "credit scores" or "insurance scores" based on confidential financial, banking and credit information.)

The FCRA, at its core, is a notice statute. *Reynolds v. Hartford Fin. Servs. Group*, 435 F.3d, 1081, 1085 (9th Cir.

2006).[1] The FCRA gives insurance companies and other users the privilege to review confidential financial information of individual consumers. *See* 15 U.S.C. § 1681b(a)(3) (authorizing credit bureaus to provide confidential consumer credit information to insurers and others). Insurance companies use that information to price insurance premiums and decide whether to offer coverage. If an insurance company takes an adverse action, such as denying insurance or increasing a premium based on a review of a consumers' credit information (*see* 15 U.S.C. § 1681a(k)(1)(B)(i)), it must give notice that it took such action. 15 U.S.C. § 1681m.

This notice serves an important purpose by allowing consumers to check their credit files to confirm that the credit information consulted was accurate. *See Reynolds*, 435 F.3d at 1085; *see also* 15 U.S.C. § 1681 (the FCRA is designed to ensure "[a]ccuracy and fairness of credit reporting."). For instance, if an insurance company offers John *Allen* Smith a higher premium because his credit score is low, he can check whether the credit information consulted was accurate. If he discovers that the insurance company mistakenly reviewed the file of John *Alan* Smith or another consumer with a slightly different social security number, he can inform the credit bureau and, ultimately, the insurer that the insurer mistakenly increased his charge based on someone else's less favorable credit information. Or the consumer may discover that the insurer based his premium on an accurate identity, but used inaccurate financial information that lowered his credit rating and resulted in an increased charge.

In the trial court, petitioners sought summary judgment on the ground that they had not taken "adverse action"

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[1] Because *Reynolds*, the published Ninth Circuit opinion at issue, is reproduced with different pagination in each petitioner's appendix, we cite the reported opinion for simplicity *Reynolds* directly addressed the *Hartford Fire* and *GEICO* cases. The *State Farm* and *Safeco* cases were separately decided by short, unpublished memoranda citing *Reynolds*.

against respondents. Petitioners argued that when a first-time applicant for insurance is charged a higher premium because of his credit score, his premium has not been "increased"; thus, they never have to give notice of an adverse action in such circumstances and can, with impunity, use inaccurate credit information to make first-time applicants pay more for insurance. Petitioners argued that they only "increase" a premium based on credit information if they first charge a consumer a premium and later, after reviewing credit information, increase the charge (perhaps on a renewal application).

The district court initially accepted petitioners' argument, but the Ninth Circuit, relying on the statute's plain meaning, rejected it, holding that "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA." *Reynolds,* 435 F.3d at 1092. The Ninth Circuit pointed out that petitioners' position would eviscerate the statute's purpose of providing even *initial* applicants for insurance the proper notice when they are charged more based on their credit information. *Id.* at 1092-92; 15 U.S.C. § 1681a(k)(1)(B)(i) (providing that an adverse action includes "any increase in any charge for * * * any insurance, existing or *applied for*") (emphasis added). The Ninth Circuit's straightforward statutory construction ensures, as the statute provides, that consumers (including first-time applicants) who are charged more for insurance based on their credit file receive proper notice.

II. THE NINTH CIRCUIT'S STATEMENTS WITH RESPECT TO WILLFULNESS

Except for State Farm, petitioners also argued in the alternative that, as a matter of law, they did not "willfully" violate the statute under 15 U.S.C. § 1681n(a)(1)(A). Because the district court mistakenly agreed with petitioners' primary argument, it never reached the issue of defendants willfulness under subsection 1681n(a)(1)(A) or examined any evidence of willfulness. *See e.g., Rausch v. Hartford Fin. Svcs Group,*

Inc., 2003 WL 22722061, *2, n. 1 (D. Or. Jul. 31, 2003) (the "Court does not reach the additional arguments in support of Defendants' Motion for Summary Judgment"), *rev'd on other grounds*, 435 F.3d 1081 (9th Cir. 2006).

The Ninth Circuit also did not consider the evidence of willfulness. Rather, it remanded for creation of a more complete record. *Reynolds*, 435 F.3d at 1099 ("[B]ecause the parties did not have an adequate opportunity to explore the issues in the district court, we remand for further proceedings.") Preliminarily, however, the court interpreted the statute to mean that petitioners could be found willful if a fact-finder eventually found *either* that petitioners knowingly or recklessly ignored the notice requirements of the FCRA.

III. PETITIONERS' MISSTATEMENTS AND SIGNIFICANT OMISSIONS

Petitioners' statements of the case contain significant omissions and misstatements that create the mistaken impression that the Ninth Circuit decided more than it did and that the records in these actions are more completely developed than they are. Certain developments post-dating the petitions also bear on the appropriateness of review.

Petitioners suggest either that they have been precluded from raising an advice of counsel defense or that the Ninth Circuit rejected this defense or ruled on it in ways that conflict with holdings of other circuits. However, in none of these cases is there a developed record on advice of counsel, and the Ninth Circuit did not rule on the defense. The Ninth Circuit merely made observations about the possible relevance of advice of counsel to willfulness and remanded for further proceedings. *Reynolds*, 435 F.3d at 1099. Those statements are *dicta* and not the source of any circuit conflict.

Indeed, for the last several years, petitioners made a tactical choice *not* to present a full-blown advice-of-counsel defense because they did not want to share the actual advice they received (which was almost certainly different from the

legal arguments they made to the district court and Ninth Circuit) and waive the attorney-client privilege as a result. Only on remand some petitioners recently raised the advice of counsel defense. The result may ultimately be a developed factual record and legal rulings based on it, but until then this case will not present any issues regarding advice of counsel suitable for appellate review, let alone review in this Court.

Petitioners also create the mistaken impression that these are certified class actions for punitive damages. Petitioners are wrong on both counts. Class certification issues are still before the trial court. In addition, respondents have stated on the record several times that they are not pursuing claims for punitive damages and have withdrawn those claims below or dropped them from amended complaints. Respondents repeat here that they are not seeking punitive damages. Respondents only seek the statutory damages (between $100 and $1,000) that Congress has provided for willful violations of the FCRA under subsection 1681n(a)(1)(A).

This Court also should be aware of certain developments that petitioners do not mention because they postdate the filing of the petitions. Most significantly, since the petitions were filed, petitioner Hartford Fire and respondent Reynolds have entered into a Memorandum of Understanding that settles the putative class case. While Hartford Fire has yet to withdraw its petition, it has agreed to do so once there is a class settlement finally approved by the district court.[2]

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[2] Other insurers have similarly settled the FCRA claims or chosen not to seek review of the Ninth Circuit's opinion. Nationwide Insurance Company settled an identical and related case before the Ninth Circuit even ruled on its case, for $280 per class member in statutory damages. In another appeal from a related case that the Ninth Circuit decided with these cases, Farmers Group Inc. chose not to seek *certiorari* from the Ninth Circuit's identical decision in their case. *See Ashby v. Farmers Group, Inc.*, No. 04-80084, Mem. Op. (9th Cir. Aug. 4, 2005).

REASONS FOR DENYING THE WRIT

I. THE PETITIONS ARE PREMATURE BECAUSE THEY ARISE OUT OF SUMMARY JUDGMENT, ARE BASED ON AN INCOMPLETE RECORD, AND THE FACTS ON WILLFULNESS HAVE NOT BEEN REVIEWED BY A LOWER COURT.

A. No Court Has Examined the Summary Judgment Facts on Willfulness.

It would be premature to address the meaning of willfulness in the current procedural context. These petitions arise out of summary judgment proceedings and, in the case of the *Safeco* appeal, a Fed. R. Civ. P. 54(b) judgment, and the disposition below was a remand for further proceedings in all cases. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 506 U.S. 946 (1993) (Scalia, J., respecting the denial of *certiorari*). The Court ordinarily limits its review of cases in an interlocutory posture to extraordinary circumstances, such as when it is necessary to prevent great inconvenience in the conduct of further proceedings. Robert L. Stern, et al., Supreme Court Practice § 4.18, at 258 (8th ed. 2002) (citing cases). The mere announcement of an abstract standard for willfulness to be applied at some point in the future does not cause great inconvenience or present extraordinary circumstances.

While Safeco, joined by all petitioners, contends that it presents a question of "enormous practical significance," it is difficult to believe that regulated persons are waiting for abstract guidance, without the benefit of how that guidance applies to any specific conduct, on whether they can be liable for either consciously or recklessly ignoring the FCRA. One would hope that corporations that enjoy the privilege of using consumer's personal banking information, credit information, social security information and other private data are not recklessly misusing such protected information in the hope

that recklessness will not suffice to make them liable under the statute. These are certainly not the "extraordinary circumstances" that should lead this Court to give guidance prior to a final resolution and in the absence of a well-developed record reviewed by the district court below.

Here, not only did this issue arise on summary judgment, but the lower courts have never even applied the law to any factual record. The district court decided these cases on alternative grounds and never considered the facts on willfulness. *See e.g., Rausch*, 2003 WL 22722061 at *2. The Ninth Circuit also did not decide the willfulness issue, but simply announced a general standard for willfulness to be applied on remand. *Reynolds*, 435 F.3d at 1099.

The meaning of the term "willful," as petitioners themselves point out, is abstract. This Court would provide little guidance to the lower courts if it simply announced an abstract definition without any corresponding application of that standard to a fully developed factual record. While the Ninth Circuit did its best to guide the district court by announcing a standard that could be applied to the facts on remand, the case will be in a better procedural posture, if still not a good candidate for Supreme Court review, once the factual record is developed and the district court has the opportunity to apply the standard to the facts — including the as-yet completely undeveloped record on what petitioners view as the critical issue of advice of counsel.

Indeed, there are many possibilities for these cases on remand. The district court may ultimately conclude that plaintiffs presented sufficient evidence that defendants "knowingly" violated the FCRA, providing evidence that goes beyond a reckless violation.[3] Thus, petitioners' request

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[3] The Safeco petitioners boldly predict that had this case been heard in other circuits, the decision granting summary judgment would be affirmed. Safeco Pet. 16. Because the courts below never examined the evidence on willfulness under any standard, this is pure, and likely inac-

(*Footnote continued*)

for a higher standard of knowing and willful conduct may ultimately be irrelevant if the court or a jury later concludes that defendants acted *both* knowingly and recklessly.

In addition, these cases may resolve by settlement. As noted above, petitioner Hartford Fire has already entered into an initial settlement with a putative class and will withdraw its petition once it is finally approved by the district court.

B. There is No Factual Record of an Advice of Counsel Defense.

Petitioners make many misstatements about the status of the advice of counsel defense. For instance, petitioner Safeco states that "the Ninth Circuit's refusal to recognize an advice of counsel defense under § 616 rests on a presumption of bad faith on the part of lawyers and clients that is unprecedented in the decisions of this Court." Safeco Pet. 22.

No petitioner, however, properly raised the "advice of counsel" defense in its summary judgment motions, and neither the district court nor the Ninth Circuit ruled on such a defense. There is no factual record of any advice of counsel defense.[4] Indeed, having prevailed on other arguments in the trial court, petitioners did not want to raise the defense and waive their attorney-client privilege unless and until they had no other supportable defense. Far from "refusing to recog-

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curate, speculation. While the district court did not reach the issue in these cases, the same court held in the related *Nationwide* case that plaintiffs would survive summary judgment even under a "knowing" standard. *Razilov v. Nationwide Mut. Ins. Co.*, 2004 WL 3090083 (D. Or. 2004).

[4] In its summary judgment papers in the trial court, GEICO did say it had consulted counsel, but it presented no evidence of what counsel advised, the timing of the consultation in relation to the conduct, or whether GEICO followed the advice. A defendant is not entitled to an advice of counsel defense "merely because he consulted an attorney in connection with a particular transaction"; he must also show that he disclosed the material facts to counsel and received advice on which he actually relied in good faith. *United States v. Rice*, 449 F.3d 887, 896-97 (8th Cir. 2006).

nize" an advice of counsel defense, the Ninth Circuit remanded the case so that petitioners could raise the defense on remand. *Reynolds*, 435 F.3d at 1099. In fact, petitioners Safeco and GEICO have now raised the defense on remand.

C. Recent Developments Since the Filing of the Petitions Confirm That the Facts of This Case Should Be Fully Developed and Not Subject to Piecemeal Review by This Court.

Developments that have taken place since the Ninth Circuit ruled further confirm that it would be premature to review these cases because of the uncertainties that exist prior to a full trial, complete factual record, and final dispositions of these cases. Not only has Hartford Fire entered into a settlement that, once approved, will moot its case before this Court could decide it, but the Safeco petitioners have now, for the first time, raised issues about whether two of the Safeco companies are proper parties to the case. These developments illustrate that the very identities of the parties are still in flux and highlight the substantial risks attendant to granting a writ of *certiorari* at an interlocutory stage of any case. This Court should not reach out to rule until it is clear that its decision will bind the appropriate parties. Without a settled record and final judgment, the landscape on remand below is constantly changing. Indeed, the parties are continuing to litigate class, discovery and other issues to this day.

II. THERE IS NO CONFLICT ON THE MEANING OF WILLFULNESS.

Petitioners maintain that this case merits review because, they claim, there is a circuit conflict regarding the meaning of a willful violation under the FCRA. Despite the Ninth Circuit's reference to a split of authority, a careful review of the statute and case law reveals there is no well-developed circuit conflict with respect to the definition of a willful violation for the particular statutory subsection at issue here, 15 U.S.C. § 1681n(a)(1)(A). The cases that petitioners cite either (a) refer

to the *mens rea* requirements for violations of sections 1681n(a)(1)(B) or 1681n(b), which both expressly require proof of a "knowing" violation, (b) involve the issue of punitive damages under section 15 U.S.C. §1681n(a)(2), or (c) otherwise do not analyze the particular statutory language at issue here. Moreover, the great majority of the cases petitioners cite do not expressly address the issue of "reckless disregard" at all, belying petitioners' claims of a mature conflict among the circuits over that specific issue.

A. The Ninth Circuit's Statutory Interpretation Is Firmly Grounded in the Statutory Language

Before turning to the claimed circuit conflict, respondents briefly review the statutory language. The claimed conflict largely disappears when it is understood that the FCRA has several different remedial subsections under the FCRA.[5]

Respondents' claims arise under 15 U.S.C. § 1681n (a)(1)(A), which provides that any person who "willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of — (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000, whichever is greater." In contrast to other FCRA sections, this subsection does not require proof of a knowing violation.

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[5] Except for State Farm, petitioners conveniently refer either to the entire section 616n of the original bill or to the codified section 1681n without addressing the several subsections with different remedial provisions and different language under 1681n. Petitioners' failure to engage in statutory analysis at the textual level of each subsection is revealing. State Farm incongruously argues that the term "willful" when used alone must mean "willful and knowing" even when Congress clearly distinguished between those distinct terms by requiring proof of only a "willful" violation for a claim under subsection 1681n(a)(1)(A), but requiring proof of both a "willful and knowing" violation in the immediately following remedial subsections of the FCRA. *See* State Farm Pet. 26-28.

The very next subsection, 1681n(a)(1)(B), provides for actual damages or at least $1,000 in statutory damages as well as punitive damages for a violation that is not only "willful" but also involves "obtaining a consumer report under false pretenses *or knowingly without a permissible purpose*" (emphasis added). Similarly, section 1681n(b) imposes liability on "any person who obtains a consumer report from a consumer reporting agency under false pretenses or *knowingly without a permissible purpose*" (emphasis added). In addition, Congress provided criminal liability under section 1681q for "any person who *knowingly and willfully* obtains information on a consumer * * * under false pretenses." 15 U.S.C. § 1681q (emphasis added). The references to willful *and* knowing violations would be superfluous if the definition of willful already required knowingly wrongful conduct.

Congress plainly understood that a merely willful violation requires something less than proof of a willful *and* knowing violation because it expressly required proof of a knowing violation or of both a "willful and knowing" violation in other civil and criminal subsections. When Congress wanted to require proof of a knowing violation of FCRA, it knew how to do so. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (stating that Congress "says in a statute what it means and means in a statute what it says there.") With respect to section 1681n(a)(1)(A), it did not. *See United Dominion Indus. Inc. v. United States*, 532 U.S. 822, 836 (2001) (noting the logic of investing significance in a notable omission of words in determining Congressional intent). Thus, the Ninth Circuit's conclusion that a willful violation does not require proof of a knowing violation is fully consistent with standard statutory interpretation.

Petitioners contend that the legislative history demonstrates that the Ninth Circuit's definition of willfulness is incorrect. But because the statutory text is clear, there is no need to consult legislative history. *Department of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 132-33 (2002).

Even if this Court were interested in legislative history, petitioners fail to cite the most directly relevant indication in that history of Congress's understanding of the meaning of "willful" conduct. In an early version of 15 U.S.C. 1681q, Congress provided criminal liability for "whoever willfully violates any provision" of the FCRA. H.R. 19410, 91st Cong., Sec. 62 (1970). Congress eventually added a "knowing and willful" criminal *mens rea*, indicating that Congress understood "willful" to mean something less than "knowing and willful" for purposes of this statute. The statute's evolution thus confirms the Ninth Circuit's interpretation of the text.

Given the language and history of the statute, the Ninth Circuit's conclusion that "willfulness" under subsection 1681n(a)(1)(A) incorporates both knowing and reckless disregard of a defendant's legal obligations is fully consistent with this Court's construction of "willfulness" in statutes dating back to the 1930s. *See Reynolds*, 435 F.3d at 1098; *see, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (a willful violation of the Age Discrimination in Employment Act requires only a "reckless disregard for the matter of whether its conduct was prohibited"); *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (stating same knowing or reckless standard); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43 (1938) (holding that civil defendant's conduct was "willful" because it showed disregard for statute and indifference to its requirements). The standard statutory definition for willful (where willful is not more specifically defined in the statute) has been settled in this Court for decades and does not need revisiting.[6]

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[6] State Farm mistakenly relies on *Kawahaauhau v. Geiger*, 523 U.S. 57, 60 (1998), in which this Court was interpreting the meaning of the bankruptcy statutes that excepts "willful and malicious injury" from bankruptcy discharge. The statute here does not require the additional element of a "malicious" injury

B. There Is No Circuit Conflict with Respect to 15 U.S.C. § 1681n(a)(1)(A).

1. The other circuits do not address the particular language of Section 1681n(a)(1)(A).

Turning to the claimed circuit conflict, a close look at the cited opinions reveals there is no direct conflict with respect to the interpretation of the text of the particular statutory subsection, 15 U.S.C. § 1681n(a)(1)(A), at issue here. In *Phillips v. Grendahl*, 312 F.3d 357, 365 (8th Cir. 2002), the only case cited by petitioners that explicitly criticizes the use of a "reckless disregard" standard under any subsection of the FCRA, the Eighth Circuit noted that the plaintiff had not clearly alleged which statutory subsection the defendant violated, but ultimately concluded that the plaintiff was alleging a violation of section 1681n(a)(1)(B), which, as noted above, expressly requires proof of obtaining a consumer report not only "willfully," but also "under false pretenses or knowingly without a permissible purpose."

Similarly, in *Duncan v. Handmaker*, 149 F.3d 424, 426 (6th Cir. 1998), the plaintiff "sought to hold defendants civilly liable for procuring the [plaintiffs'] consumer reports under false pretenses." The Sixth Circuit noted that plaintiffs invoked a prior version of the statute that provided civil liability for violation of the criminal section, 1681q, "which criminalizes the act of knowingly and willfully obtaining information under false pretenses." 149 F.3d at 426, n 1. Several other circuits also specifically analyze 15 U.S.C. § 1681q, which "imposes criminal liability upon any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses." *Zamora v. Valley Fed. Sav. & Loan Ass'n of Grand Junction*, 811 F.2d 1368, 1370 (10th Cir. 1987). *See also Bakker v. McKinnon*, 152 F.3d 1007, 1010 (8th Cir. 1998) (analyzing a claim for a violation of section 1681(q)); *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 971-72 (4th Cir. 1987) (analyzing knowing or false pretense

standard under section 1681q).[7] These circuits' requirement of proof of a knowing violation under a different statutory subsection, 1681q, are consistent with the Ninth Circuit's interpretation of subsection 1681n(a)(1)(A).

The remaining cases relied upon by petitioners fail to interpret the particular text of subsection 1681n(a)(1)(A) or broadly refer to Section 1681n without any substantive textual analysis. *See Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 417-418 (4th Cir. 2001) (citing generally section 1681n and 1681o and failing to address the specific statutory language); *Ausherman v. Bank of America Corp.*, 352 F.3d 896, 900 (4th Cir. 2003) (following *Dalton* without textual analysis); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 833 (7th Cir. 2004) (citing generally section 1681n and stating only that proof of punitive damages requires proof of a knowing and intentional violation); *Ruffin-Thompkins v. Experian Info. Solutions*, 422 F.3d 603, 610 (7th Cir. 2005) (citing *Wantz* and section 1681n generally); *Bagby v. Experian Info. Solutions*, 162 Fed. Appx. 600, 605 (7th Cir. 2006) (same); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293-94 (5th Cir. 1993) (generally referring to "[s]ection 1681n [which] authorizes the court to award actual damages, punitive damages and reasonable attorney fees * * *.") Moreover, in none of these cases did the courts specifically address the question of "reckless disregard" as an avenue of proving willfulness, let alone reject it.

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[7] Petitioners also claim that the Ninth Circuit's opinions conflict with an unpublished Ninth Circuit opinion, *Arriola v. Safeco*, 1993 WL 530480 (9th Cir. 1993). Intra-circuit conflicts are generally not a ground for certiorari, and because *Arriola* is non-precedential, there is no intra-circuit conflict in any event. Moreover, petitioners made this same argument to no avail when requesting that the Ninth Circuit rehear these cases *en banc*. *Arriola* involved the criminal liability section 1681q which requires proof of both a willful and knowing violation. *Arriola*, 1993 WL 530480, *1. Likely recognizing the absence of any conflict, the Ninth Circuit denied *en banc* rehearing in all cases.

Further, a number of the circuits that discuss a willful violation of section 1681n, even if vaguely and without analysis of the statutory language of the particular subsections, do so in the context of resolving a claim for punitive damages under section 1681n(a)(2). The Fourth and Fifth Circuits (and a number of later cases) expressly rely on an earlier Fifth Circuit case, *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987). *See Dalton*, 257 F.3d at 418 (quoting *Pinner*); *Stevenson*, 987 F.2d at 293-94 (quoting and relying on *Pinner*); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001) (quoting *Pinner* in case involving jury award of $4.47 million for willful violation). *See also Northrop v. Simsbury, Inc.*, 12 Fed. Appx. 44, 50 (2d Cir. 2001) (failing to analyze statutory text and reviewing claim for punitive damages based on willful violation); *Casella v. Equifax Credit Info. Svc's*, 56 F.3d 469, 476 (2d Cir. 1995) (same), *cert. denied*, 517 U.S. 1150 (1996); *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 753 (5th Cir. 2002) (analyzing punitive damages); *Wantz*, 386 F.2d at 833 (same). In *Pinner*, the definition of willfulness adopted by the court was based on the requirements for proof of punitive damages under section 1681n(a)(2). The court focused on whether the jury had sufficient evidence to award punitive damages:

> 'Willful' is a word of many meanings — its construction often influenced by its context. But here, there is simply nothing to even suggest that [defendants] willfully set out to do Pinner harm. There is no evidence that they knowingly and intentionally committed an act in conscious disregard for the rights of others. The jury's award of punitive damages lacked any evidentiary support whatsoever.

805 F.2d at 1263. Unlike *Pinner* and its progeny, the cases at issue do not involve any claim for punitive damages as respondents, plaintiffs below, seek only statutory damages.

We have no quarrel with *Pinner*. The meaning of willful is often influenced by context. As State Farm argues, this Court has examined statutory terms such as willful "both in the immediate context in which it is used and the context of provisions in which it is embedded." *See* State Farm Pet. 24 (citing *Bryan v. United States*, 524 U.S. 184, 191 (1998)). Indeed, in *Bryan*, this Court noted that a willful *mens rea* may include "careless disregard" for the rights of others. 524 U.S. at 191, n. 12. Here, Section 1681n(a)(1)(A)'s use of the term "willful," without reference to knowledge, means something less than a knowing violation in the context of the "other provisions in which it is embedded," which include Congress's express requirement of proof of a "knowing and willful" violation under sections 1681q and 1681n(a)(1)(B).

2. The Ninth Circuit's definition of willful is consistent with other circuits' definitions.

The Ninth Circuit's definition of a willful violation under section 1681n(a)(1)(A) expressly relies upon and is entirely consistent with the Third Circuit's definition. *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226-27 (3d Cir. 1997).[8] In *Cushman*, the Third Circuit noted that plaintiff could prove her FCRA violation if she proved either that the defendant credit reporting agency took action "knowing that policy to be in contravention of the rights possessed by consumers or in reckless disregard of whether the policy contravened those rights." *Id.* at 227. This is the same standard expressly adopted by the Ninth Circuit. *Reynolds*, 435 F.3d at 1097. Petitioner Safeco incredibly tries to create a circuit conflict out of whole cloth by claiming that even the Third Circuit's interpretation in "*Cushman* cannot plausibly be said to hold that 'reckless disregard' satisfies the 'willfulness' standard under § 616." Safeco Pet. 17, n 7. On the contrary, the Third

[8] *Cushman* itself involves punitive damages and does not directly address the specific issue in this case, liability under § 1681n(a)(1)(A).

Circuit's express holding that proof of "reckless disregard" satisfies the statute cannot be read any other way. Significantly, in light of petitioners' assertion of a raging conflict over this issue, *Cushman* has not been rejected, criticized, or even distinguished by any other court of appeals in a case under section 1681n (a)(1)(A) in the nearly ten years since the case was decided; indeed, the decision below and *Phillips*, which addressed a claim under section 1681n(a)(1)(B), appear to be the only appellate decisions ever to have discussed *Cushman's* recklessness holding.

Moreover, the Third Circuit's interchangeable use of the terms "conscious disregard" and "reckless disregard" indicates that the Circuits do not find these terms significantly different. *Cushman*, 115 F.3d at 226-227 (citing *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996), and *Pinner*, 805 F.2d at 1263). Similarly, the Ninth Circuit expressly held that the willfulness standard involves "'a conscious disregard' of the law, which means either 'knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Reynolds*, 435 F.2d at 1098, *quoting Cushman*, 115 F.3d at 227. Except for *Phillips*, which involved subsection 1681n(a)(1)(B), petitioners cite no court that has expressly disagreed with the Ninth and Third Circuits and held that "conscious disregard" and "reckless disregard" are mutually exclusive under this statute, and thus opinions that merely mention "conscious disregard" cannot be interpreted as conflicting with the decision below (or with *Cushman*).

C. The State Farm Petitioners Did Not Raise the "Willfulness" Issue Below and Cannot for the First Time Before This Court.

State Farm acknowledges that the willfulness issue was not decided below in its case, but still contends that it may raise that issue solely because the Ninth Circuit based its unpublished *State Farm* opinion on its resolution of *other* issues

in its published *Reynolds* opinion. State Farm Pet. 29 n.15. State Farm contends that *every* issue raised in *Reynolds*, including willfulness, is therefore a proper issue for review in *State Farm*. That is not the law. State Farm argued to the Ninth Circuit only that (1) State Farm Fire did not take an "adverse action" against respondent Willes and (2) State Farm Mutual did not reject Willes's application because, according to State Farm, she only applied to State Farm Fire. *See* State Farm Appellees' Br. 2 (Issues Presented for Review). State Farm did not argue willfulness in its brief, and its petition does not even claim it did,[9] nor did the Ninth Circuit mention willfulness in its *State Farm* memorandum. Having neither been raised nor decided below, the issue is not properly before this Court in the State Farm petition. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148, n. 2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

D. The Ninth Circuit Did Not Resolve Any Advice of Counsel Defenses.

Having failed to create a credible circuit split on the definition of "willful" for the purposes of Section 1681n(a)(1)(B), petitioners try to redefine the Ninth Circuit's standard as a mere negligence standard through their discussion of a red-herring issue — the *potential* "advice of counsel" defense for which there is no factual record.

Because the Ninth Circuit did not rule on the advice of counsel defense, its observations about the subject are *dicta* and could not form the basis for any claim of a circuit split. Even as *dicta*, the Ninth Circuit's observations are not "extreme," as petitioners suggest. The Ninth Circuit merely stated that "neither a deliberate failure to determine the ex-

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[9] State Farm belatedly raised the issue when seeking *en banc* rehearing, which the court denied in *State Farm* without reaching this issue.

tent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement." *Reynolds*, 435 F.3d at 1099. The Ninth Circuit's view is entirely consistent with the settled principle that an advice of counsel defense cannot prevail if the defendant did not honestly believe the advice received was proper but instead had "reason to doubt" it. *United States v. Mathes*, 151 F.3d 251, 255 (5th Cir. 1998), *cert denied*, 525 U.S. 1059 (1998) (citation omitted). A blatant inconsistency between the purported advice and the clear terms of a statute would clearly be a relevant consideration in assessing such a defense. Petitioners pull out of context individual words such as "unreasonable" to create the impression that the Ninth Circuit adopted a negligence standard, when the Ninth Circuit was only guiding the district court to look at the extent of "the obviousness or unreasonableness of the erroneous interpretation." *Reynolds*, 435 F.3d at 1099. Indeed, the Ninth Circuit expressly rejected a negligence standard. 435 F.3d at 1097-98 (citing *McLaughlin*, 486 U.S. at 133 (noting that willful conduct is not merely negligent)).

Rather than credibly arguing that this *dicta* somehow creates a conflict in the law, petitioners favor sweeping statements of hyperbole that the Ninth Circuit has somehow prejudged the evidence. To that end, State Farm argues:

> Under the Ninth Circuit's decision, factors that normally favor a finding of an absence of willfulness and/or recklessness as a matter of law are turned on their heads, all in service of a jaundiced and unsupported view of how business and companies formulate their conduct in regulatory and compliance contexts and how lawyers view their obligations to their clients and the legal system.

State Farm Pet. 29. The purportedly skewed "factors" (actually standard and neutral tests for proving willful misconduct) do not prejudge the conduct of petitioners or their at-

torneys because the Ninth Circuit did not reach the evidence, much less find that petitioners acted willfully "as a matter of law." The court reached no conclusion as to how petitioners' lawyers "view[ed] their obligations to their clients and the legal system," precisely because petitioners have not yet offered any evidence of their lawyers' advice. Indeed, for all we know, their lawyers may have given proper direction on how to follow the law, which petitioners disregarded.

The Ninth Circuit's *dicta* concerning advice of counsel is also not in conflict with *Thurston*, 469 U.S. at 128. In *Thurston*, this Court concluded that the defendants had not willfully violated the ADEA because defendants had offered evidence that they had consulted with their attorneys in *good faith* to determine if a retirement policy in a massive collective bargaining was proper. *Thurston* expressly held that "the record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." 469 U.S. at 129. Here, by contrast, there is no record of any petitioner's consultations with attorneys (whether in good faith or not), and the Ninth Circuit stated, consistently with *Thurston*, that "[a] company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous interpretation of the statute." 435 F.3d at 1099.

Petitioners also contend, without record support, that the after-the-fact legal *arguments* they made to the district court and the Ninth Circuit reflected the same legal *advice* on how to comply with the FCRA that they received from counsel at the time of the conduct giving rise to the violations, and they leap from that unfounded factual premise to the conclusion that their reliance on counsel could not have been reckless or even unreasonable simply because the district court later erroneously accepted their interpretation of "adverse action" under FCRA (an interpretation held by the Ninth Circuit to

be contrary to the plain meaning of the Act). As support for this argument, and to suggest a conflict with decisions of this Court, petitioners cite *Professional Real Estate Investors v. Columbia Pictures Ass'n*, 508 U.S. 49 (1993) ("*PREI*"), which they say holds that a legal position accepted by a district court cannot, as a matter of law, be unreasonable.

PREI, however, has no bearing on this case. *PREI* concerns the "sham" exception to antitrust immunity and holds only that judicial findings that a litigant has objectively reasonable grounds for litigating preclude a finding that the litigation was a sham. More generally, the *PREI* Court observed, in a footnote cited by petitioners, that a "winning lawsuit" cannot be objectively unreasonable. *Id.* at 57 n.5. But litigation in which a party's arguments are rejected on appeal can hardly be termed "winning." Nowhere does *PREI* or any other case cited by petitioners hold that an after-the-fact argument raised in litigation in defense to a statutory violation provides an absolute advice of counsel defense as long as a district court initially (but erroneously) agrees with the argument. Indeed, legal advice received after the conduct cannot support a defense of lack of willfulness. *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc.*, 120 F.3d 1253, 1259 (Fed Cir. 1997), *cert denied*, 523 U.S. 1071 (1998).

Petitioners also cannot cite a single case holding that a defendant cannot be liable *as a matter of law* for a willful violation on an issue of first impression, particularly where, as here, the statute is unambiguous on its face, and there is evidence that petitioners were instructed on how to comply with the statute by specific FTC advisories, understood they had to comply, and had notice from prior case law that discussed the issue without definitively deciding it.[10]

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[10] *See e.g.*, FTC "Prescribed Notice of User Responsibilities," 16 C.F.R. Pt. 601, App. C (stating in July 1997 that "adverse actions include all business, credit, and employment actions affecting consumers that can be considered to have a negative impact * * *"); March 1, 2000 letter

(*Footnote continued*)

In *Reich v. Gateway Press*, 13 F.3d 685, 701 (3d Cir. 1994), relied upon by petitioners, the Third Circuit affirmed the district court's conclusion that there was evidence that the defendant reasonably believed it was complying with the law and, therefore, was not willful. While the court noted that this was an issue of first impression and considered that a factor in determining willfulness, it did not hold that a defendant can never willfully violate a statute unless that statute has been previously interpreted. Such a sweeping conclusion would give all regulated persons the right to violate any statute with impunity until it has first been interpreted by a court. There is no case so holding and no conflict in either this Court's or the court of appeal's case law on this point.[11]

Finally, the evidence below, though not fully developed, indicated that petitioners' legal arguments in this litigation were directly contrary to their understanding at the time of their conduct. For instance, petitioner Hartford Fire argued to

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from FTC's Hannah Stires to James Ball (providing notice to insurance companies in March 2000 that failing to offer best price or discount in response to initial application for insurance was adverse action); FTC Notice, "Consumer Reports: What Insurers Need to Know" (stating in October 1998 that adverse action occurs when initial applicant denied coverage at standard rates). *See also Mick v. Level Propane Gasses, Inc.*, 1999 WL 33453772 (S.D. Ohio 1999) (stating in the context of a class action decision that offering an initial applicant less favorable credit terms based on credit information may be adverse action under FCRA).

[11] *Stevenson v. TRW, Inc.*, 987 F.2d at 296, notes that the defendant did not have prior guidance that its notice of consumer rights was deficient, but it does not hold that the statute had to be interpreted by a court first. In *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995), the court exercised its discretion to deny punitive damages where prior maritime law decisions provided no specific guidance to the defendant. In *Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985), the court held that a defendants' reliance on certain appellate rulings was reasonable in light of a circuit-split that had not been resolved. None of these fact-bound decisions holds that a defendant cannot, as a matter of law, willfully violate a statute that has not been interpreted.

the district court and the Ninth Circuit that "an insurer does not take 'adverse action,' ... when the insurer charges a specific insured an initial premium on a new policy that is higher than the best rate available." Hartford Resp. Br. 9. However, *at the time of the conduct at issue*, Hartford Fire instructed its agents that "[t]he FCRA, which is applicable in all states, requires an adverse action notice for consumers not receiving our best rate."[12] The record on review does not support petitioners' unsupported assumption that the after-the-fact legal arguments that they made below necessarily reflected their subjective understanding at the time they violated the FCRA.

III. THIS CASE LIKELY WILL NOT HAVE WIDESPREAD IMPACT IN LIGHT OF DECISIONS HOLDING THAT A RECENT FCRA AMENDMENT HAS PROSPECTIVELY ELIMINATED THE CLAIMS ASSERTED HERE.

Contrary to petitioners' predictions, there is substantial doubt that these cases will have major ongoing impact in light of recent decisions holding there is no longer a private civil right of action under section 1681n for violations of section 1681m, the "adverse action" notice requirement. Petitioners fail to inform this Court that at least eleven courts, including the Seventh Circuit and several district courts within the Ninth Circuit, have held that a 2003 amendment to the FCRA, the Fair and Accurate Credit Transactions Act (FACTA), eliminated private rights of action for violations of 15 U.S.C. § 1681m that postdate FACTA. *See* 15 U.S.C. 1681m(h)(8)(A) (stating that section 1681n shall not apply to violations of this section and providing exclusive enforcement by federal agencies); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 950 (7th Cir. 2006); *Putkowski v. Irwin Home*

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[12] Attached to Appellants' Response to Appellees' Second Amended Petition for Rehearing *En Banc*, *Reynolds v. Hartford Fire*, Ninth Circuit Case No. 03-35695.

Equity Corp., 423 F.Supp. 2d 1053, 1061-62 (N.D. Cal. 2006); *Phillips v. New Century Fin. Corp.*, 2006 WL 517653, *3-4 (C.D. Cal. Mar. 1, 2006); *White v. E-Loan, Inc.*, 409 F. Supp. 2d 1183, 1187 (N.D. Cal. 2006); *Harris v. Fletcher Chrysler Prods.*, 2006 WL 279030, *3 (S.D. Ind. Feb. 2, 2006); *Stavroff v. Gurley Leep Dodge*, 413 F. Supp. 2d 962, 967 (N.D. Ind. 2006); *Murray v. Household Bank (SB)*, 386 F. Supp. 2d 993, 999 (N.D. Ill. 2005); *Bonner v. Home123 Corp.*, 2006 WL 1518974, *5 (N.D. Ind. May 25, 2006) ("*Bonner I*"); *Bonner v. CorTrust Bank*, 2006 WL 1980183, *3 (N.D. Ind. July 12, 2006) ("*Bonner II*"); *Crowder v. PMI Mortgage Ins. Co.*, 2006 WL 1528608, *2-5 (M.D. Ala. May 26, 2006); *Cavin v. Home Loan Ctr.*, 2006 WL 1313191 (N.D. Ill. May 10, 2006); *but see Barnette v. Brook Road*, 429 F. Supp. 2d 741, 748 (E.D. Va. 2006) (rejected in *Bonner I*, *Crowder*, *Bonner II*, and *Cavin*).

As the Seventh Circuit explained in *Murray*:

> A recent amendment to the Act abolishes private remedies for violations of the clear-disclosure requirement, which in the future will be enforced administratively, but that change does not apply to offers made before its effective date and thus does not affect this litigation. See 117 Stat.1952, adding 15 U.S.C. § 1681m (h)(8).

434 F.3d at 950. Respondents take no position about the correctness of these decisions, but they at least cast serious doubt on petitioners' assertion that the Ninth Circuit's decision will unleash a flood of new litigation under the FCRA.

While petitioners fail to mention these cases, they provide vague, misleading and incomplete citations to recently filed cases that are intended to give this Court the mistaken impression that there has been an explosion of litigation under section 1681n(a)(1)(A) as a result of the Ninth Circuit's ruling. Petitioners' purported support for such groundless claims is merely a reference to dockets of cases in which plaintiffs purportedly included a claim under section 1681n of the FCRA without identifying which subsection is at issue.

Safeco Pet. 13, n.5; Hartford Pet. 23. These references fail to demonstrate any connection between the Ninth Circuit's opinion and the recently filed cases. Undoubtedly, there have been many cases filed under the FCRA in federal courts for over thirty years because the statute regulates many different entities, including, most comprehensively, the credit bureaus that provide credit information. Petitioners' attempt to attribute an increase in litigation to the Ninth Circuit's opinion is pure speculation. As noted above, it is more likely that there has been or will be a decline in the filing of these types of cases because the courts have held that the claims at issue here have been eliminated by the FACTA.

IV. PETITIONERS' REMAINING CHALLENGES TO THE NINTH CIRCUIT'S RULING ON "ADVERSE ACTION" UNDER THE FCRA DO NOT MERIT REVIEW.

State Farm and GEICO also seek review of the Ninth Circuit's interpretation of "adverse action" under the FCRA. Neither State Farm nor GEICO contends that the Ninth Circuit's statutory interpretation conflicts with the law of this Court or any other circuit. As the Ninth Circuit correctly noted, no other circuit has addressed the definition of "adverse action" under section 1681a(k)(1)(B)(i). *Reynolds*, 435 F.3d at 1091. Moreover, the Ninth Circuit's interpretation is consistent with the Sixth Circuit's interpretation of a similar notice provision in the Truth in Lending Act ("TILA"). *See Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001) (holding TILA's notice requirements are triggered when a credit customer is charged more than he otherwise would have been if he had paid in cash). State Farm and GEICO do not provide any "compelling reasons" for review. Their arguments are solely directed at correction of a supposed error and without merit in any event.

A. State Farm Misinterprets the Statute.

The FCRA provides that an insurance company must give notice if it takes an adverse action against any consumer "based in whole or part on any information contained in a consumer report." 15 U.S.C. § 1681m (a). The definition of "adverse action" includes "an increase in any charge, or a reduction or other unfavorable change in the terms of * * * any insurance, *existing or applied for* in connection with the underwriting of insurance" 15 U.S.C. § 1681a(k)(1)(B) (emphasis added). Thus, the definition includes an increase in either a renewal or an *initial* applicant's charge for insurance. Eviscerating FCRA's purpose of providing notice when consumers are charged more based on the review of their private credit information, the district court held that an increase could only occur if an applicant initially applied for insurance, received a premium quote, and then that initial quote was later increased based on the applicant's credit information. State Farm continues to assert this position on review.

As the FTC made clear in an amicus brief before the Ninth Circuit on this narrow issue, "[t]his is absurd since it assumes that an insurer would make a formal offer of insurance to a consumer and then, after making that offer, would evaluate the consumer's insurability." FTC Amicus Br. 14 (filed in Ninth Circuit in *Willes v. State Farm*, Case No. 03-35848). The Ninth Circuit agreed and correctly held that an increase occurs when the consumer is charged more for insurance "based in whole or part" on credit information — in other words, the consumer is entitled to notice if she would have received a lower rate if she had a better qualifying credit score or other relevant credit information. *Reynolds*, 435 F.3d at 1093.[13] This holding is not radical. Indeed, this is

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[13] State Farm misleadingly states that the Ninth Circuit requires notice to everyone who does not have "perfect credit." State Farm Pet. 18. That is not the standard. The insurance companies themselves set the credit scores at which consumers will be charged more for insurance, and

(*Footnote continued*)

the understanding that petitioner Hartford Fire, and likely all petitioners, had when it instructed its agents that "[t]he FCRA, which is applicable in all states, requires an adverse action notice for consumers *not receiving our best rate*." *See* footnote 12, *supra*. It is also the position that the FTC staff, well before this lawsuit, had taken for years based on a plain reading of the statute. *See* footnote 10, *supra*. A contrary rule would permit insurance companies to increase rates charged millions of consumers for insurance, perhaps based on inaccurate information, without giving consumers any notice or opportunity to confirm that their rates were being increased based on accurate information. *Reynolds*, 435 F.3d at 1092.[14]

B. The GEICO Petitioners Misstate the Ninth Circuit's Holding.

In an attempt to make the Ninth Circuit's straightforward statutory interpretation appear extreme, the GEICO petitioners simply misrepresent it. The GEICO petitioners argue that the Ninth Circuit's ruling requires that insurance companies give notice to consumers "even though their credit informa-

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do not require a perfect score for the best rate. Thus, if an insurance company charges anyone who has a credit score under 700 (on a scale of 850) more for their insurance, only those consumers are entitled to notice.

[14] State Farm also contends that the Ninth Circuit erred in holding one of its companies, State Farm Mutual, could be liable under FCRA, because, it asserts, respondent Willes only applied to State Farm Fire. In *Reynolds*, the Ninth Circuit, relying on the plain language of FCRA making "any person" who takes an adverse action liable for a failure to give notice, 15 U.S.C. § 1681m (a), held that when an insured seeks insurance from a family of companies, and when each of them might have offered insurance depending on the applicant's credit score, each company may be liable for violating FCRA's notice requirements if an adverse action (premium increase or denial of insurance) is not disclosed. 435 F.3d at 1095-97. The court applied this ruling in *State Farm*, holding that because State Farm Mutual denied Ms. Willes a policy because her credit score was not higher, it could be liable under FCRA. State Farm does not contend that this common-sense, fact-bound ruling is in conflict with any other appellate decisions. The issue plainly does not merit review.

tion had either no impact or a favorable impact on the rates or terms provided." GEICO Pet. 25. The Ninth Circuit actually held just the opposite: that notice is only required if a "consumer pays a higher rate because his credit rating is less than the top potential score." *Reynolds*, 435 F.3d at 1093. That is, the consumer is only entitled to notice when his premium is increased above what it would have otherwise been "based in whole or in part" on a review of his credit information." 15 U.S.C. § 1681m(a). In any event, GEICO's incorrect contention that Edo somehow benefited from GEICO's review of his credit information, which resulted in a higher charge, is truly a quarrel with the Ninth Circuit' application of law to fact, and not an issue meriting review here.

C. The Ninth Circuit's Opinion Does Not Impose New Notice Requirements Under the FCRA.

Finally, Hartford Fire, in an argument presented as an afterthought, contends that the Ninth Circuit imposed new notice requirements on insurers. It did not. The Ninth Circuit's ruling on the adequacy of Hartford's notices was based simply on the fact that "[t]hey did not tell [the insured] that any adverse action had been taken against him" and thus did not comply with a bedrock requirement on the face of the statute. *Reynolds*, 435 F.3d at 1095. The Ninth Circuit's further descriptions of the statutory notice requirements are *dicta* that merely restate and explain in plain English the notice requirements set forth in section 1681m(a) of the FCRA. Hartford Fire does not contend, and cannot, that there is any circuit conflict on this issue, any conflict with the precedents of this Court, or any other proper reasons why this is an issue worthy of this Court's review. In any event, because the Hartford petitioners are settling, there is no need to resolve the issue in this case.

CONCLUSION

For the reasons stated above, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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Date: August 2006

(3)

FILED
SEP 6 - 2006
OFFICE OF THE CLERK

No. 06-84

IN THE
Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at page iii of the petition for a writ of certiorari, and there are no amendments to those Statements.

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For more than 20 years, it has been settled law that the extraordinary relief of statutory and punitive damages under FCRA requires that defendants have *intentionally* violated a known legal obligation. In the decision below, the Ninth Circuit explicitly broke with the settled precedent of other circuits and held that the statutory "willfulness" prerequisite can be satisfied by a showing that defendants acted with "reckless disregard" for the law. The circuit split on this question is clear, and resolution of the pure question of law presented here will not be affected by any later developments in this case.

Delaying review of this purely legal issue will cause great hardship to petitioners and to many other American businesses, as demonstrated by the large number of *amici* that have urged the Court to grant these petitions. Absent review now, petitioners will suffer needless expenses for discovery and, potentially, a full trial – as well as significant intrusion into petitioners' attorney-client relationships – all of which will be conducted under an incorrect legal standard. At least as significant, if the Court delays review, many other businesses will continue to be subject to the rapidly mounting number of nationwide FCRA class actions filed in the Ninth Circuit. Years of litigation in such cases under a Ninth Circuit standard that the other circuit courts have explicitly rejected will waste enormous judicial and private resources.

It is important to stress that the interpretation of "willfulness" defines the standard of liability for statutory and punitive damages for *all* of FCRA's requirements, not just the notice provisions of § 615. In the few years since Congress's 2003 amendments to FCRA, which respondents wrongly claim obviate the importance of the issue presented here, literally *thousands* of new FCRA actions have been filed, including a recent rash of class action cases filed in the Ninth Circuit since the decisions at issue here were released. The Court should thus grant review to resolve the frequently recurring and extremely significant question of law presented here.

I. THE CIRCUIT SPLIT ON FCRA'S WILLFULNESS REQUIREMENT IS CLEAR AND DEEP

Respondents' attempt to deny the existence of a circuit split on the meaning of "willfulness" under § 616 of FCRA is unavailing. The Ninth Circuit's opinion in the decision at issue here itself acknowledged a split with the Sixth and Eighth Circuits, both of which "rejected the reckless disregard standard and require[] actual knowledge with regard to the law." Pet. App. 128a n.17 (citing *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002), and *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998)). In fact, the split is even deeper than the decision below acknowledged. The Seventh Circuit has expressly followed the Eighth Circuit's rejection of a "reckless disregard" standard, *see Wantz v. Experian Info. Solutions*, 386 F.3d 829 (7th Cir. 2004), and five other circuits have held that § 616's willfulness requirement requires conduct that is "knowing and intentional," "deliberate and purposeful," or in "conscious disregard" of the law – all standards that are facially inconsistent with the Ninth Circuit's novel reckless disregard test. *See* Pet. 16-19.

Respondents are wrong to assert that these cases deal with a different subsection of § 616. *See* Opp. 15-16. As to the Eighth Circuit's decision in *Phillips*, respondents simply mischaracterize the opinion. The court's rejection of a "reckless disregard" standard was not limited to claims alleging impermissible use of a credit report that arise under § 616(a)(1)(B) as opposed to § 616(a)(1)(A). The court's discussion on this point was clearly addressed to § 616(a) as a whole; indeed, its opinion contains a *separate* discussion of § 616(a)(1)(B) in particular. *See Phillips*, 312 F.3d at 371. The Eighth Circuit's holding was unequivocal: "The statute's use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful." *Id.* at 368; *see id.* at 370 ("We conclude that our Circuit precedent is consistent with the rules that willful noncompliance under section 1681n [*i.e.*, § 616] requires knowing and intentional commission of an

act *the defendant knows to violate the law.*") (emphasis added). The Seventh Circuit's decision in *Wantz*, which followed *Phillips*, clearly arose under § 616(a)(1)(A), not § 616(a)(1)(B). *See* 386 F.3d at 832-34.[1]

The conflict with the Sixth Circuit's decision in *Duncan* is just as stark. *Duncan* is not distinguishable on the ground that it was limited to cases where civil liability was premised on a violation of § 619 of FCRA, 15 U.S.C. § 1681q. As even Judge Reinhardt acknowledged, the holding of *Duncan* applies generally to *all* civil actions brought under § 616, not just those predicated on a criminal violation under § 619. *See* 149 F.3d at 429 (holding that a knowledge requirement "comports with the language of § 1681n, which imposes liability for 'willful noncompliance' with the FCRA"). Indeed, a subsequent decision of the Sixth Circuit confirms this. *See Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 364 (6th Cir. 2005) (holding in an action premised on violations of § 623(a)(1)(A) of FCRA, 15 U.S.C. § 1681s-2(a)(1)(A), that willfulness under § 616(a) requires "knowingly and intentionally committing an act in conscious disregard for the rights of others"). Respondents' arguments for distinguishing these cases thus rest on mischaracterizations and false distinctions that were not accepted by Judge Reinhardt and have never been recognized by any court.

Respondents attempt to discount other cases cited in the petition because they involved claims for punitive damages whereas respondents seek only statutory damages. *See* Opp. 17. But § 616 does not distinguish between statutory and punitive damages: once a willful violation is shown, a plaintiff is eligible to receive both. *See*

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[1] Several district courts have likewise applied *Phillips* to claims arising under § 616(a)(1)(A). *See Jordan v. Equifax Info. Servs., LLC*, 410 F. Supp. 2d 1349, 1353-54 (N.D. Ga. 2006) (claims alleging failure to provide accurate credit reports); *Gohman v. Equifax Info. Servs., LLC*, 395 F. Supp. 2d 822, 826, 828 (D. Minn. 2005) (same); *Graham v. CSC Credit Servs., Inc.*, 306 F. Supp. 2d 873, 877-78, 880 (D. Minn. 2004) (same).

15 U.S.C. § 1681n(a)(1)-(2). The fact that § 616 triggers punitive as well as statutory damages strongly supports a requirement of actual knowledge. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages are intended "to punish the tortfeasor whose wrongful action was *intentional or malicious*, and to deter him and others from similar extreme conduct") (emphasis added). At any rate, the interpretation of the willfulness requirement can hardly change from case to case based on what damages plaintiffs elect to pursue. Indeed, respondents fail to disclose that their abandonment of punitive damages did not occur until *after* the case was remanded by the Ninth Circuit, and was apparently coordinated among the respondents in all of the related FCRA cases pending before this Court.[2]

Contrary to respondents' assertion, the Third Circuit's decision in *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226-27 (3d Cir. 1997), does not support the Ninth Circuit's position. As explained in the petition (at 17 n.7), *Cushman* cannot reasonably be interpreted to have established a recklessness standard because it expressly cited the Third Circuit's prior decision in *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996), as well as the Fifth Circuit's decision in *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), both of which rejected such a standard in no uncertain terms. *See* 115 F.3d at 226.

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[2] Plaintiffs in the case below did not withdraw their claim for punitive damages until they filed their Fifth Amended Complaint just before the petition in this case was filed. *See* Fifth Am. Compl., *Spano v. Safeco Ins. Co of Am.*, No. CV 01-1464 (D. Or. filed July 6, 2006). The same was true in *State Farm*. *See* Fourth Am. Compl., *Willes v. State Farm Fire & Cas. Co.*, No. CV 01-1457 (D. Or. filed June 23, 2006). In *GEICO* and *Hartford Fire*, the plaintiffs did not amend their prayer for relief until the very day their brief in opposition was filed in this Court. *See* Plaintiffs' Notice of Withdrawal of Punitive Damages Claim, *Rausch v. The Hartford Fin. Servs. Group, Inc.*, No. CV 01-1529 (D. Or. filed Aug. 22, 2006); Plaintiffs' Notice of Withdrawal of Punitive Damages Claim, *Edo v. GEICO Cas. Co.*, No. CV 02-678 (D. Or. filed Aug. 21, 2006).

With the exception of the decision below, no other court has interpreted *Cushman* to support a reckless disregard standard. Rather, both the Second and Eighth Circuits have construed *Cushman* as requiring a knowing and intentional violation. *See Phillips*, 312 F.3d at 368; *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998); *Northrop v. Hoffman of Simsbury, Inc.*, 12 F. App'x 44, 50 (2d Cir. 2001).

At bottom, the position of respondents and the Ninth Circuit is at odds with the unanimous conclusion of eight other circuits that reckless disregard for the law is insufficient to give rise to liability under § 616. The Ninth Circuit's interpretation of § 616's willfulness requirement is inconsistent with the structure of FCRA's two-tiered liability provisions, as well as the clear legislative history of those provisions' enactment. *See* Pet. 19-23. Because the original Senate bill required "gross negligence" – *i.e.*, recklessness – to recover even *actual* damages, the willfulness requirement for statutory and punitive damages must necessarily have required a higher standard. Moreover, Congress amended FCRA several times without altering the unanimous opinion of the circuit courts that willfulness required actual knowledge.

Respondents' rejoinder focuses on the fact that § 616(a)(1)(B) uses the word "willful" in conjunction with a particular substantive cause of action that imports an actual knowledge requirement – namely, "obtaining a consumer credit report under false pretenses or knowingly without a permissible purpose." Respondents draw precisely the wrong inference from this fact. Section 616(a)(1)(B) confirms that Congress meant "willful" in the context of § 616(a) to require actual knowledge; otherwise, the combination of a "willfulness" *mens rea* standard with a "knowing" substantive liability standard would be utterly incongruous. *See* Brief for Freedomworks Foundation as *Amicus Curiae* in Support of Petitioners 14-15. Respondents' suggestion (at 14) that the substitution of the phrase "knowing and willful" for "willful" indicates

that "Congress understood 'willful' to mean something less than 'knowing and willful'" for purposes of FCRA's criminal provision, § 619, is also misplaced, given that the term "willful" is understood to import a *higher* level of intentionality than the term "knowing." *See Bryan v. United States*, 524 U.S. 184, 193-94 (1998).

Finally, respondents suggest that "reckless disregard" is really no different from "deliberate," "purposeful," or "conscious" action. As a matter of plain language, respondents' argument is implausible. *See, e.g., Webster's II New College Dictionary* 239 (1999) (defining "conscious" as "[d]eliberately conceived or done: intentional"). Moreover, as the Eighth Circuit in *Phillips* recognized, and as this case illustrates, there is a critical difference between a requirement that the "defendant know his or her conduct is unlawful" and the Ninth Circuit's "reckless disregard" holding. Under the latter, defendants' good-faith but erroneous reliance on interpretations of the statute that are later found to be "unreasonable" or "implausible" may still give rise to statutory and punitive damages. This unprecedented holding gravely heightens "the danger of ensnaring individuals engaged in apparently innocent conduct" under a highly technical and complex statute such as FCRA. *Bryan*, 524 U.S. at 194.

II. THERE IS NO REASON TO POSTPONE RESOLUTION OF THE CIRCUIT SPLIT

Resolution of the circuit split is needed now. The decision below requires prompt review because it dilutes the standard of liability for statutory and punitive damages for violations of *all* of FCRA's complex and manifold requirements. Deferring the issue will subject petitioners to needless expense, potential release of materials subject to attorney-client privilege, and acute settlement pressure, thus potentially allowing the decision below to evade review. Beyond that, allowing this Ninth Circuit decision to remain in place will continue to make that circuit a magnet for nationwide FCRA class actions, leading to an enormous waste of judicial and private resources as those

cases are adjudicated under an erroneous legal standard rejected by every other circuit to consider the issue.

A. The Question Presented Is a Pure Issue of Law, the Resolution of Which Will Eliminate the Need for Further Proceedings

This Court's review is appropriate now because the issue presented is a pure question of federal statutory interpretation, and reversal of the decision below would spare petitioners the cost and risk of further proceedings. This Court has not hesitated to grant certiorari to review a nonfinal judgment, including a denial of summary judgment, where, as here, the decision below conflicts on an important question of federal law with another court of appeals. Indeed, the Court in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 129-31 (1988), granted certiorari in an identical posture to review the definition of willfulness under the Fair Labor Standards Act of 1938. *See also, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 164-65 (2004) (reviewing a reversal of a grant of summary judgment to address a question under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980); *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 21-22 (2004) (reviewing a reversal of a grant of summary judgment in order to resolve a circuit split on two questions of federal maritime law). Review in this posture is far from "extraordinary." *See generally* 17 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 4036, at 30 & n.57 (2d ed. 1988) (citing numerous cases and noting that such review is not limited to "exceptional circumstances").

Certiorari is especially well justified in this case because resolution of the question presented will "hasten or finally resolve the litigation." Robert L. Stern, *et al.*, *Supreme Court Practice* 260 (8th ed. 2002) (citing cases); *see also United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (certiorari is appropriate where the issue "is fundamental to the further conduct of the case"; reviewing court of appeals' reversal of judgment and

remand for new trial). No further proceedings in this case would have been needed if the Ninth Circuit had followed the unanimous decisions of its sister circuits and held that FCRA's "use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful." *Phillips*, 312 F.3d at 368. Under that standard, the district court's grant of summary judgment should have been affirmed. Petitioners could not have known that they were violating § 615 because there was not a single judicial opinion in the 35 years since FCRA's passage holding that notice is required in the context of initial policies for insurance.[3]

Contrary to respondents' contention, no further factual findings are needed to apply the proper "willfulness" standard to this case. Indeed, further proceedings would be inappropriate. As the Fifth Circuit held in *Stevenson v. TRW Inc.*, 987 F.2d 288 (5th Cir. 1993), because "[t]here was no prior guidance to suggest that [defendant's] notice was insufficient," the court "[could]not conclude that [it] knowingly and intentionally obscured the notice in conscious disregard of consumers' rights." *Id.* at 296. In this case, not only was there "no prior guidance" that the adverse-action notice requirement was triggered in the context of initial policies of insurance, but the district court *agreed* with petitioners' legal position that such an interpretation of FCRA was correct.[4] These facts, which

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[3] Respondents misleadingly contend (at 9 n.3) that the district court in the *Nationwide* case denied summary judgment under even a "knowing" standard, but the relevant claim was that credit information had been used to increase the premium upon renewal, not in an initial policy of insurance, and the issue was the adequacy of notice, upon which courts had provided substantial guidance. *See Razilov v. Nationwide Mut. Ins. Co.*, No. CV 01-1466, 2004 WL 3090083 (D. Or. Mar. 3, 2004).

[4] Contrary to respondents' suggestion (at 24), such a standard does not give defendants immunity from FCRA liability in cases where a statute's provisions have not been interpreted. The "willfulness" standard serves as a prerequisite only to the extraordinary remedies of statutory and punitive damages under § 616. *Cf.* 15 U.S.C. § 1681*o* (imposing actual damages for negligent violations of FCRA).

were fully developed in the lower courts, should have resulted in judgment as a matter of law for petitioners and should have obviated the need for a costly and intrusive investigation into Safeco's internal decision-making and the advice Safeco and its officers received from counsel.

A grant of certiorari now is also appropriate to avoid the possibility that the Ninth Circuit's decision will evade meaningful review. In this case alone, statutory damages for the purported nationwide class of insurance purchasers potentially exceed $75 billion. *See* Pet. 24. As the potential settlement by Hartford Fire indicates, the onerous prospect of discovery and trial in a case involving damages of that magnitude will put immense settlement pressure on FCRA defendants such as Safeco and will potentially prevent the Ninth Circuit's deviant and erroneous decision from being reviewed by this Court. *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (in mass class actions, "settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims").

B. The Proper Definition of Willfulness Is of Enormous Importance to American Business

Delaying review will also do significant damage to American businesses because, until corrected by this Court, the Ninth Circuit will continue to be a magnet for nationwide class actions under FCRA, and its anomalous definition of willfulness will be imposed on companies nationwide. As the history of post-*Reynolds* litigation demonstrates, plaintiffs have already seized on the Ninth Circuit's unprecedented definition in an effort to obtain millions of dollars in statutory and punitive damages by filing purported nationwide class actions under § 616 in district courts in the Ninth Circuit. *See* Pet. 13 & n.5 (noting the wave of new claims after *Reynolds*).

The Ninth Circuit's novel and erroneous interpretation of "willfulness" abridges a fundamental statutory safeguard against huge windfall profits to plaintiffs at the

expense of American companies. FCRA subjects a wide range of corporations – including insurers, credit card companies, banks, and employers – to comprehensive and highly technical regulations regarding the use of consumer credit information. Section 616 of FCRA allows plaintiffs to seek up to $1,000 in statutory damages, as well as punitive damages, for each FCRA violation, without any need to prove any actual harm. Unlike other federal statutes, there is no cap on such damages in the context of a class action. Given the frequency with which credit information is commercially used, and § 616's $1,000-per-occurrence statutory damages provision, the potential exposure of American business is astronomical.

Contrary to respondents' arguments, *see* Opp. 25-27, the 2003 amendments to FCRA, the Fair and Accurate Credit Transactions Act ("FACTA"), do nothing to mitigate the impact of the Ninth Circuit's erroneous definition of willfulness. FACTA merely amended FCRA to eliminate private rights of action under § 616 and § 617 for violations of the notice provisions of § 615, leaving such violations to administrative enforcement instead. But § 616 continues to apply to causes of action arising under all of FCRA's other provisions. Notwithstanding FACTA's enactment in 2003, approximately 2,600 lawsuits, and hundreds of class actions, have been filed since January 2004 alleging FCRA violations other than § 615, including a rash of new purported nationwide class actions in district courts in the Ninth Circuit seeking statutory and punitive damages under § 616. *See* Hartford Fire Pet. 23, No. 06-82; Pet. 13 n.5. The Ninth Circuit's decision, if allowed to go uncorrected, will single-handedly permit hundreds of millions of dollars in nationwide claims for statutory and punitive damages to proceed under an erroneous and unprecedented legal standard. This Court's intervention is therefore warranted.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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September 6, 2006

FILED
AUG 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-82, 06-84, 06-100 & 06-101

IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY, *Petitioner*,

v.

JASON JAY REYNOLDS, *Respondent*.

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*, *Petitioners*,

v.

CHARLES BURR, *et al.*, *Respondents*.

(captions continued on inside cover)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN INSURANCE ASSOCIATION AND THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONERS

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v.

AJENE EDO, *Respondent.*

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Petitioners*,

v.

JULIE WILLES, *Respondent.*

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding, contrary to the decisions of at least seven other circuits, that a defendant may be found to have "willfully" violated the Fair Credit Reporting Act even if it did not have actual knowledge that its conduct violated the FCRA.

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INTEREST OF AMICI CURIAE[1]

The American Insurance Association (AIA) and the National Association of Mutual Insurance Companies (NAMIC) are national trade associations representing companies writing property and casualty insurance in every state and jurisdiction of the United States. Collectively, AIA and NAMIC members underwrite over $300 billion in premiums each year and provide coverage in a broad range of personal and commercial lines of business. Both amici regularly appear in judicial proceedings to inform courts about the implications of legal developments for their members. Both participated below as amici in support of Petitioners.

Review of the Ninth Circuit's interpretation of the Fair Credit Reporting Act (FCRA) is extremely important to both AIA and NAMIC. The Ninth Circuit's construction of the decades-old statute as imposing requirements on insurance companies that no court previously has recognized, and its indication that defendants might be found liable for "willfully" violating these unprecedented requirements, despite their good-faith compliance efforts, threaten members of the insurance industry with substantial and severe liability.

STATEMENT

In the 1990s, many insurers began using credit-based insurance scores—scores derived from credit report information—in underwriting and pricing personal lines of insurance. The use of such scores enables insurers to rate insurance risks more accurately and, thus, to avoid subsidization by some consumers of the higher risks presented by other consumers. The more accurate classification of risk trans-

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part. No person or entity, other than amici and their members, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

lates into lower premiums for many consumers and increased availability of coverage.

The FCRA requires the entity that "takes any adverse action" to issue an adverse-action notice. 15 U.S.C. § 1681m(a). Each insurance company using insurance scores made a determination of what triggered its FCRA duty to provide adverse-action notices. Separate determinations made by different insurers, often on advice of counsel, resulted in various practices. Given the absence of any court decisions interpreting the FCRA's insurance adverse-action definition—15 U.S.C. § 1681a(k)(1)(B)(i)—or any binding agency regulations, insurers conformed their practices to their good-faith interpretations of the FCRA's text and any applicable state-law requirements.

Many insurers reasonably determined that the FCRA did not require adverse-action notices upon the setting of an initial charge for insurance and, accordingly, for a number of years, did not provide notices in such circumstances. Even among those insurers that did provide notices in such "initial charge" circumstances, many did not do so in the broad "best rate" circumstances apparently now required by the court of appeals. Instead, rationally, many insurers attempted to determine when their use of insurance scores—compared to not using such scores—would adversely affect the consumer and issued adverse-action notices in those circumstances. To notify a consumer that she had been adversely affected when in fact she was helped by the use of her insurance score—even if the consumer might have been helped more had her insurance score been better—would have contradicted *common* sense.

Many insurance-company groups operate in an economically efficient, integrated fashion, in which a separate and distinct corporate entity provides centralized insurance, financial, technological, and management services to affiliated issuing insurers through written agreements. Often, this separate corporate entity orders consumers' insurance scores and applies previously established rating criteria to determine an appropriate premium. Sometimes, a con-

sumer's rate is affected by the placement of the consumer with one of several insurer affiliates within an integrated company group (where the affiliates offer different rating levels). Amici know of no company that believed, prior to the Ninth Circuit's decision, that entities other than the affiliated insurer who issued the relevant policy (or was responsible for denying coverage for the integrated company group altogether) must issue adverse-action notices.

In 2001 and 2002, a group of consumers initiated eight putative nationwide class actions in federal district court, alleging that Petitioners' and other insurers' adverse-action notice practices contravened the FCRA's requirements.[2] The complainants did not allege that they had suffered any actual damages, which a plaintiff must show to recover for a "negligent" violation of the FCRA. 15 U.S.C. § 1681o. Instead, the complainants sought an extraordinary remedy of statutory and punitive damages under § 1681n, which states that "[a]ny person who *willfully* fails to comply with any requirement imposed under [the Act] with respect to any consumer is liable to that consumer" for statutory damages of $100 to $1000 per violation, punitive damages, and attorneys fees. 15 U.S.C. § 1681n(a) (emphasis added).

The district court, addressing questions of national first impression, concluded in one of the cases that only the insurance affiliate to whom a consumer applies can "take" an adverse action and therefore incur an obligation to issue a notice. *Willes* v. *State Farm Fire & Cas. Co.*, CV 01-1457-BR, State Farm Pet. App. 74a-75a. In another case, the district court also held that an "adverse action" does not occur when

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[2] *Ashby* v. *FICO*, CV 01-1446-BR (filed Sept. 28, 2001); *Willes* v. *State Farm Fire & Casualty*, CV 01-1457-BR (filed Oct. 1, 2001); *Spano* v. *Safeco Ins. Co. of Or.*, CV 01-1464-BR (filed Oct. 2, 2001); *Dikeman* v. *Progressive Corp.*, CV 01-01465-BR (filed Oct. 2, 2001); *Razilov* v. *AMCO Ins. Co.*, CV 01-1466-BR (filed Oct. 3, 2001); *Rausch* v. *Hartford Fin. Servs. Group*, CV 01-1529-BR (filed Oct. 16, 2001); *Mark* v. *Valley Ins. Co.*, No. CV-01-1575-BR (filed Oct. 24, 2001); *Edo* v. *GEICO Cas. Co.*, CV 02-678-BR (filed May 24, 2002).

an insurer, on the basis of information in a consumer's credit report, charges the consumer an initial rate that is higher than the best available rate. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1318-1319 (D. Or. 2003). Based on the same reasoning, and on appropriate motions, the district court granted summary judgment to all Petitioners in these cases. At the time they were issued, the district court's decisions on these questions were the first and only reported opinions addressing the application of the FCRA's "adverse-action" notice requirement in this insurance context. *See id; Spano* v. *SAFECO Ins. Co.*, 215 F.R.D. 601 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977 (D. Or. 2003).

Plaintiffs in the four cases at bar appealed the adverse summary judgment rulings to the Ninth Circuit. In an opinion issued on August 4, 2005, in the consolidated *Reynolds* and *Edo* cases, a divided panel reversed the district court on each of the FCRA issues described above.[3] In particular, the Ninth Circuit held that an adverse action occurs when an insurer charges an initial rate that is higher than the consumer would have been offered if he had a better credit score, and that any insurance entity with any relation to the scoring of the consumer or a rate decision for that consumer is obligated to send an adverse-action notice. Pet. App. 48a-54a, 57a-60a.[4]

The Ninth Circuit also rejected Petitioners' arguments that they were entitled to summary judgment in any event because any alleged noncompliance was not "willfu[l]" under § 1681n. Pet. App. 65a-66a. The court concluded that the

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[3] The Court resolved the appeals of Petitioners State Farm and Safeco in unpublished dispositions issued the same day and relied therein on the decision in the consolidated *Reynolds* and *Edo* cases. This brief uses the term "decision below" to refer to the Ninth Circuit's last decision under the consolidated *Reynolds* and *Edo* caption. *See infra* 5-6.

[4] In this brief, citations to the "Pet. App." are to the Appendix to the Petition for Safeco Insurance Company unless otherwise indicated.

"willfulness" standard encompasses not only "conscious disregard" of known legal obligations, but also "recklessness." *Id.* at 62a. In addition, the court reasoned, a defendant may act "recklessly" if it adopts "unreasonable answers to issues of first impression" under the FCRA. *Id.* at 64a. Two members of the panel then went further, concluding (apparently as a matter of law) that Petitioners' interpretations were so "objectively unmeritorious" that they were reckless and thus willful. *Id.* at 64a-65a. The panel majority did not explain how its conclusion could possibly be consistent with the fact that the district court—another Article III tribunal—had concluded that the FCRA "unambiguous[ly] and plainly" supported Petitioners' construction of the statute. *Mark*, 275 F. Supp. 2d at 1318. Judge Bybee dissented, explaining that he "would not decide, as a matter of fact or law, that the insurance companies acted willfully" without further examination of that question. Pet. App. 67a-68a.

Joined by several amici, including the AIA and NAMIC, Petitioners sought rehearing en banc, noting that the Ninth Circuit's holding that adherence to an "unreasonable" legal interpretation may constitute willful noncompliance directly contradicted decisions of this Court. *See, e.g.*, Br. for Amici Curiae AIA and NAMIC in Support of Pet. for Reh'g En Banc 5-6 (citing *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (rejecting the proposition that "a finding of unreasonableness [would] suffice as proof of" willfulness); *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 616 (1993)). In response, the Ninth Circuit issued an amended opinion that reached the same result but removed the words "reasonable" and "unreasonable," replacing them with synonyms such as "tenable," "indefensible," and "implausible." Pet. App. 69a-99a. Judge Bybee again dissented. *Id.* at 99a-101a.

Petitioners once more sought rehearing en banc, and the Ninth Circuit issued another amended opinion. This time, however, the court responded to the petitions by retreating from its *sua sponte* finding of Petitioners' alleged willful noncompliance, instead remanding to the district court to decide whether Petitioners had "willfully" violated the

FCRA. *Id.* at 129a. The court appeared to set forth a two-step framework for addressing that question under its "reckless disregard" standard: First, a court should determine whether a defendant adopted an interpretation of the FCRA that the court (in hindsight) finds "implausible." *Id.* If so, the court must then examine the "obviousness or unreasonableness of the erroneous interpretation" and, "[i]n some cases," "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* The court noted that it found "some" of Petitioners' FCRA interpretations "implausible," without further specification, thus requiring the additional "recklessness" inquiry on remand. *Id.* The Ninth Circuit did not, however, specify how a district court is to apply or otherwise use the "unreasonableness" or "company decision" factors, what weight should be accorded each, or when examination of the second is appropriate.

SUMMARY OF ARGUMENT

Amici agree with Petitioners that the decision below implicates a clear and entrenched circuit split on the meaning of the term "willfully" in 15 U.S.C. § 1681n, and that the Ninth Circuit adopted an erroneous interpretation of that term. Amici urge this Court to resolve that split now, in the context of these cases, for two reasons.

First, the Ninth Circuit's incorrect construction of the term "willfully" will require costly, intrusive, and needless litigation under a standard likely to breed significant confusion in the district court. Had the Ninth Circuit interpreted § 1681n correctly, Petitioners should have been entitled to judgment as a matter of law on the ground that they did not "conscious[ly] disregard" any known legal obligations under the FCRA. The positions Petitioners had followed and defended in the district court and Ninth Circuit were not only eminently reasonable, they were in fact more faithful to statutory text and structure than those the Ninth Circuit adopted. The only court previously to address those positions—the district court—not only had *agreed* with Petitioners' interpretations of the FCRA, but in fact had concluded

that the statutory text "reasonably cannot be read" to support the construction that the *Ninth Circuit* later adopted. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003). The Ninth Circuit's novel construction of the FCRA's adverse-action notice requirement was neither known nor established prior to the decision in these cases. Petitioners' failure to comply with that unlikely construction thus could not constitute "conscious disregard" of known legal obligations under the FCRA.

Second, the Ninth Circuit's erroneous construction of § 1681n threatens substantial harm to the insurance industry. If allowed to stand, the decisions below will permit the imposition of staggering liability, with necessarily severe consequences for insurers and consumers alike. Moreover, because questions of first impression regarding the FCRA may frequently arise in other insurance contexts, insurers will face the threat of costly class-action litigation and substantial liability for any interpretation of the Act that a court later deems "implausible." The Ninth Circuit's erroneous interpretation will similarly bind the many other businesses that routinely make use of consumer credit information. This Court's review is critical to protecting personal-lines insurers and other businesses from substantial damages that Congress never intended to impose.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER COURTS OF APPEALS AND IS ERRONEOUS

Amici agree with Petitioners that there is a clear and well-developed split among the circuit courts on the important question of the meaning of the term "willfully" in 15 U.S.C. § 1681n. As Petitioners explain, the Ninth Circuit's decision conflicts with the holdings of at least seven other circuits, which have concluded that a defendant "willfully" violates the FCRA only if it "knowingly and intentionally committed an act in conscious disregard for the rights of the consumer." *Ausherman* v. *Bank of Am. Corp.*, 352 F.3d 896,

900 (4th Cir. 2003); *see Wantz* v. *Experian Inf. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357, 368 (8th Cir. 2002); *Cousin* v. *Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Casella* v. *Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995); *Zamora* v. *Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (per curiam); Hartford Fire Pet. 11-15; Safeco Pet. 14-19; GEICO Pet. 10-13; State Farm Pet. 21-23. Amici also agree with Petitioners that the Ninth Circuit's interpretation of "willfully" is erroneous, because it conflicts with the FCRA's text, structure, and history, and because the Ninth Circuit's reasoning is inconsistent with decisions of this Court. *See* Pet. for Hartford Fire, at 15-20; Pet. for Safeco, at 19-23; Pet. for GEICO, at 13-24; Pet. for State Farm, at 23-30.

Petitioners comprehensively and persuasively brief these issues, and amici will not repeat those arguments here. Instead, amici submit this brief to explain why the Court should resolve the circuit split at this time and in these cases. Review is necessary now for two principal reasons. First, the Ninth Circuit's decision will require Petitioners to engage in wholly unnecessary and costly litigation in these cases under an ill-defined, standardless, and intrusive framework governing the "recklessness" inquiry. Second, the decision below threatens grave injury to the insurance industry as a whole, permitting substantial statutory damage awards in FCRA adverse-action litigation and encouraging the filing of class-action suits seeking massive damages for blameless conduct in this and other FCRA contexts.

A. The Ninth Circuit's Erroneous Decision Requires Wholly Unnecessary And Costly Litigation Under A "Willfulness" Standard That Lacks Any Definite Content

The Ninth Circuit remanded these cases based on its finding that "some" of Petitioners' interpretations of the FCRA were "implausible." Pet. App. 129a. In the Ninth Circuit's view, its hindsight observation of supposed "implausibility" triggered the need for a remand so that the dis-

trict court could now undertake an additional and searching inquiry to determine whether certain of the defendant's failures to comply with the FCRA were "reckless," thereby giving rise to statutory and punitive damages. *Id.* The Ninth Circuit explained that this "recklessness" inquiry involves at least two factors—the "unreasonableness" of the defendant's interpretation of the FCRA, and a factual inquiry into the manner in which the defendant's decision makers reached the supposedly "implausible" interpretations, based on "the testimony of the company's executives *and counsel*." *Id.* (emphasis added).

The Ninth Circuit failed to clarify the content or purpose of any step in this analysis. It did not, for example, explain what constitutes an "implausible" interpretation beyond its bare assertion that "at least some" of Petitioners' positions satisfied that standard, without further specification. The Ninth Circuit provided no guidance about how courts are to identify those interpretations that are sufficiently "implausible" to warrant further "recklessness" scrutiny but not so "unreasonable" as to justify a finding of "recklessness." And the court failed to direct what weight either of the two factors should carry or what is unique about "some cases" that requires an examination of the internal communications between an insurer and its counsel. The Ninth Circuit's decision thus breeds confusion and, until it is reversed, will require district courts confronted with class actions seeking massive statutory damages under the FCRA to apply a "recklessness" framework that defies concrete application.

B. Under The Correct Standard, All Petitioners Should Have Been Entitled To Judgment As A Matter Of Law

The standardless litigation to which the Ninth Circuit has subjected the parties and the district court is not justified. Under the correct interpretation of the term "willfully" in § 1681n, adopted by at least seven courts of appeals, the only question the court should have addressed in these cases was whether the defendants exhibited "conscious disregard"

of known legal obligations. *See supra* pp. 7-8 (citing cases adopting this standard). The answer to that question here was plainly no. The positions Petitioners adopted regarding the FCRA's adverse-action notice requirement were not only eminently reasonable, they were in fact compliant with the FCRA. The district court concluded, in the first published opinions addressing these questions, that the FCRA "unambiguous[ly] and plainly" supported Petitioners' interpretations. *Mark*, 275 F. Supp. 2d at 1318. And in any event, where, as here, "[t]here was no prior guidance to suggest that" defendants' practices were "insufficient" under the FCRA, the court "[could] not conclude that [the defendants] knowingly and intentionally" violated the FCRA "in conscious disregard of consumers' rights." *Stevenson* v. *TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993). A closer examination of the actual FCRA statutory violations that the Ninth Circuit believes Petitioners may have "recklessly" committed demonstrates the magnitude of the court's error in these cases.

1. An "Adverse Action" Does Not Occur Whenever An Insurer Charges A Customer More Than The Insurer's Best Rate, Or When An Insurer Establishes An Initial Insurance Charge

The FCRA defines an "adverse action" in the insurance context to mean:

> a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

§ 1681a(k)(1)(B)(i). The Ninth Circuit held that the establishment of an initial charge is covered by the statutory phrase "'increase in any charge' . . . for insurance." Pet. App. 114a. In particular, the Ninth Circuit concluded that an insurer "increase[s]" a "charge" for insurance, based on a credit report, when the insurer "charg[es] a higher price for initial insurance than the insured would otherwise have been

charged because of information in a consumer credit report." *Id.* at 114a.

As Petitioners argued below, that reading runs contrary to the plain meaning of the statutory text. The Ninth Circuit recognized that "'[i]ncrease' means to make something greater." *Id.* Yet one cannot make "something" greater if that "something"—here a charge to the consumer—does not yet exist. This is not only the natural use of "increase," but also the way numerous courts, including the Ninth Circuit itself, have used the term.[5]

The Ninth Circuit rejected this customary meaning of "increase" based on a phrase found later in the "adverse action" definition: "any insurance, existing or applied for." The court assumed that Congress intended each of the various actions described in § 1681a(k)(1)(B)(i)—*e.g.*, "denial," "increase"—to modify both "existing" and "applied for" insurance. Pet. App. 115a. But that assumption is erroneous; the court's reading ignores that most of the actions described in § 1681a(k)(1)(B)(i) make sense only when read to modify either "existing" or "applied for" insurance, but not both. For example, "cancellation" naturally modifies only "existing" insurance, as in the cancellation of an existing insurance policy based on information learned from a customer's credit report. One cannot "cancel" something that does not exist. The term "denial," on the other hand, naturally modifies only insurance that a consumer has "applied for," as in the denial of an application for insurance based on information in the applicant's credit report. Thus, insurers could reasonably interpret § 1681a(k)(1)(B)(i) as requiring notices for

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[5] *See Certain Underwriters at Lloyd's* v. *Montford*, 52 F.3d 219, 221 (9th Cir. 1995) ("The insured value ... was initially set at $925,000, and was [later] increased to $1,050,000 ...."); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 558 (1962) (plurality op.); *Bernklau* v. *Principi*, 291 F.3d 795, 798 (Fed. Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1016 (10th Cir. 2002); *United States* v. *Schallom*, 998 F.2d 196, 199 (4th Cir. 1993) (per curiam); *United States* v. *Golden*, 954 F.2d 1413, 1415 (7th Cir. 1992).

- a "denial" of an "appli[cation]" for insurance,
- a "cancellation" of "existing" insurance,
- an "increase in any charge for . . . existing" insurance, or
- "a reduction or other adverse or unfavorable change in the terms of coverage or amount of . . . existing" insurance.

By stretching the term "increase" to modify both "existing" and "applied for" insurance, the Ninth Circuit effectively interpreted "increase" to mean establishing an insurance "charge" that does not yet exist and doing so at a higher level than the "charge" might have been established under different circumstances. That reading, to say the least, strains the normal, straightforward reading of the term. That much is clear from the Ninth Circuit's awkwardly phrased conclusion that the plaintiff's "rate was increased above that which it would have otherwise been because of his credit report." Pet.App. 117a.

But even if the FCRA's definition of "adverse action" did extend to "increase[s]" in "charge[s]" above a hypothetical and nonexistent charge, the Ninth Circuit's "best rate" construction—*i.e.*, that an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *id.* at 118a—is neither obvious nor correct. The court's interpretation does not seek to measure the effect that the use of a credit report has on an insurance charge. For example, in the Ninth Circuit's view, the application of the adverse-action notice requirement does not turn on whether the use of a credit report adversely affects a consumer versus the non-use of that credit report. Rather, the Ninth Circuit decision requires insurers to measure the adverseness of using credit-report information against a hypothetical scenario in which different credit-report information is used. Nothing in the statute suggests that construction, nor did the court attempt to ground its holding in any statutory text. Rather, the court appeared to impose the requirement as a matter of mere policy. *See id.*

The Ninth Circuit's interpretation flies in the face of common sense. In that court's view, the FCRA would require insurers to notify a consumer that she was adversely affected by the use of her credit report even if that use in fact yielded a *better* rate than had her credit report not been used at all.

Recent congressional action supports the view that both the "initial charge" and "best rate" constructions in the decisions below are erroneous. In 2003, Congress amended the FCRA to require creditors (but not insurers) to provide a separate "risk-based-pricing" notice to a consumer when the use of credit-report information results in an offer with "material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers." Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 311(a), 117 Stat. 1952, 1988 (codified at 15 U.S.C. § 1681m(h)(1)). This new provision expressly applies to initial offers and specifies a baseline (not "best rate") against which a creditor must measure the effect that use of credit-report information had. Congress thus knew how to link an FCRA notice requirement to the setting of an initial rate that is not as favorable as another baseline rate. That the FCRA's insurance-specific, adverse-action definition lacks similarly plain language confirms the error of the Ninth Circuit's decision. Indeed, the court's construction would hold insurers to a higher standard than lenders, even though the only clear FCRA textual requirement for the provision of notices in this context is the risk-based pricing provision for creditors added by the 2003 FCRA amendments.

2. An Insurance Affiliate That Neither Issues An Insurance Policy To A Person Nor Denies That Person Insurance Coverage Does Not "Take" An "Adverse Action" Against That Person

As Petitioners argued below, only the entity that issues the relevant insurance policy (and thus, for example,

"charge[s]" a customer for insurance or "cancel[s]" that insurance) or the entity that "deni[es]" insurance coverage "takes" one of the "adverse actions" specified in § 1681a(k)(1)(B)(i). Only that entity is therefore required under the FCRA to send the consumer an "adverse action" notice. The Ninth Circuit erred in exposing additional insurer affiliates to liability if they do not send their own additional notices to the consumer or list themselves in the original notice. The court cast this unjustifiably wide net of liability by holding that any entity with any theoretical connection to an insurance rating decision "takes" an "adverse action" within the meaning of § 1681m(a), and therefore may be held liable when a consumer is not provided an adverse-action notice.

The Ninth Circuit's conclusion was based primarily on an incorrect piecing together of multiple statutory sections. The court emphasized two phrases: "any person" in § 1681m(a), and "in connection with the underwriting of insurance" in § 1681a(k)(1)(B)(i). The Ninth Circuit apparently believed that these phrases, if read together, reveal congressional intent to require any person with any theoretical connection to the purported adverse action to issue an adverse-action notice. *See* Pet. App. 122a. The terms are found in different statutory provisions, however, and there is no indication that Congress intended the meaning the Ninth Circuit adopted.

The court also purported to ground its construction in the FCRA's purposes, but its holding runs counter to those purposes. As the Ninth Circuit noted, adverse-action notices are intended to provide consumers "important information about the benefits of improving their credit rating." Pet. App. 116a. That information is conveyed by any single entity providing an adverse-action notice, thereby informing the consumer that her credit information contributed to an adverse action. Requiring every insurance entity with any theoretical connection to the purported adverse action to issue such a notice, or requiring every such entity to be listed in a single notice, does nothing to enhance the con-

sumer's understanding. In fact, such a requirement is likely only to confuse. Under the decisions below, consumers must receive notices from numerous insurance entities (or notices listing numerous such entities) with whom the consumer has never had any interaction.

C. The Ninth Circuit's Refusal To Grant Judgment As A Matter Of Law On The Question Of Willfulness Illustrates The Serious Error In That Court's Approach

Petitioners' constructions of the FCRA adverse-action requirement were compliant with the Act and, at a minimum, were far from unreasonable. The Ninth Circuit's contrary construction of that requirement was for this reason far from preordained. For purposes of the proper "willfulness" inquiry, the rules imposed under the court's novel interpretation of the FCRA could hardly be termed known legal obligations. Accordingly, had the Ninth Circuit applied the proper legal standard when considering respondents' allegations of "willful" noncompliance, only one judgment could have been rendered. Petitioners did not knowingly and intentionally disregard any known legal obligation under the FCRA. The Ninth Circuit's remand for a costly inquiry into petitioners alleged "recklessness" should never have been ordered.

The decision below thus compellingly illustrates the serious error in the Ninth Circuit's interpretation of § 1681n. At base, the Ninth Circuit held Petitioners to have "willfully" violated the FCRA simply because the court disagreed with Petitioners' answers to questions of first impression regarding ambiguous and complex statutory provisions. The court labeled "some of" Petitioners' positions "implausible" even though the agency charged with enforcing the FCRA's requirements had issued no binding interpretation of the relevant provisions and had not for 30 years (and to amici's knowledge, still has not) brought any enforcement action against an insurance company for failing to issue adverse-action notices in these circumstances. And the court reached these conclusions even though another Article

III court had adopted precisely the positions Petitioners advanced—and had further concluded that the statutory text "reasonably cannot be read" to support the *Ninth Circuit's* construction. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d at 1317; *see Spano* v. *Safeco Ins. Co.*, 215 F.R.D. 601, 605-606 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213, 1224-1226 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977, 988-991 (D. Or. 2003).

Although the Ninth Circuit purported merely to construe the FCRA's statutory requirements, the court's reasoning resembles the type of rulemaking that is not properly the province of an Article III court, yet without the notice and opportunity for comment that normally accompanies such process. The court then imposed these requirements *ex post facto* by finding that Petitioners should have obeyed them long before they were ever announced. In doing so, the court relied more on its own policy judgments than on any "intent" reasonably attributable to Congress. A stark example is the Ninth Circuit's holding regarding who "takes" an adverse action. The court based its expansion of the adverse-action requirement to multiple insurance company affiliates based on mere conjecture that consumers probably do not "understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure." Pet. App. 124a. The court then asserted—without reference to statutory text, structure or legislative history—that Congress intended the FCRA to remedy this assumed lack of knowledge "[b]y imposing joint and several liability" on all insurance entities tangentially related to an insurance rating decision. *Id.*; *see id.* ("By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy."). From that speculative recreation of congressional intent, the Ninth Circuit then fashioned from whole cloth new obligations that

no court or agency had ever imposed.[6] And, most remarkably, the court concluded that its interpretations were the *only* "plausible" ones, accordingly holding that any insurer that failed to anticipate them had acted so recklessly that it could be subject to statutory and punitive damages, the sanction reserved for only the most severe and intentional violations of the FCRA.

The Ninth Circuit's authorization of such severe penalties in these circumstances fundamentally distorts the structure of the FCRA. The statute permits actual (compensatory) damages for "negligent" conduct, *i.e.*, when the defendant should have known, in the exercise of due care, that its practices violated the Act. § 1681o. The statute provides for statutory and punitive damages, by contrast, only when the defendant acts "willfully." By construing the term "willfully" to cover conduct that—for reasons amici explain above—does not even qualify as "negligent," the Ninth Circuit turned Congress's intent on its head. *See* Hartford Fire Pet. 16-17.

The interpretation of the term "willfully" adopted by the Ninth Circuit is dangerous for yet another reason. It will in the future require insurers to give the FCRA the broadest possible reading, in all contexts, lest a court later disagree and interpret the Act differently. As Petitioners demonstrate, that result frustrates the very purposes that the FCRA was designed to further. This effect is com-

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[6] Moreover, as Petitioner Hartford Fire argues, Hartford Fire Pet. 23-26, the Ninth Circuit engaged in the same type of unguided "interpretation" in creating rules—without urging by any party or amici, and without the benefit of briefing—respecting the information that must be contained in an adverse-action notice. *See* Pet. App. 121a. The Ninth Circuit relegated the requirements that *Congress* prescribed to a footnote, and supplemented the plain language of the statute with additional requirements that the *court* deemed important. Thus, based on little more than its own conceptions of good policy, the court held that an adverse-action notice must "at a minimum, . . . describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action, and their respective roles." *Id.*

pounded by the Ninth Circuit's creation of an entirely novel standard for adjudicating a party's "willfulness" based on terms like "untenable," "creative," "implausible," and "indefensible." Those words carry no established meaning in other legal contexts, and only the Ninth Circuit knows their intended meaning here. The result is an unknown and unknowable standard that provides regulated parties no useful guidance.

By addressing these cases, this Court can both correct the Ninth Circuit's pernicious construction and resolve the circuit split that the decisions below both highlight and exacerbate.

II. THE NINTH CIRCUIT'S DECISIONS ARE OF SUBSTANTIAL IMPORTANCE TO THE INSURANCE INDUSTRY AS A WHOLE

The issues the Ninth Circuit addressed have substantial importance not just to the parties, but to all of the insurance industry, many members of which interpreted the Act much as Petitioners did. The conclusions in the decision below expose insurers to statutory damages in situations that Congress did not intend, and to punitive damages even when they have sought in good faith to comply with the FCRA, including by seeking counsel's advice. This exposure threatens significant liability, with broad ramifications for the industry's ability to perform its important functions. Amici estimate that since the beginning of 2001, more than 150 million new personal lines insurance policies have been written. Conservatively estimating that adverse-action violations might be found for half of those policies under the Ninth Circuit's incorrect constructions of the Act, the potential liability is staggering—particularly since the FCRA, unlike the Truth In Lending Act, does not impose a cap on the total statutory damages available in class-action litigation. *Compare* 15 U.S.C. § 1681o(a)(1), *with id.* § 1640(a)(2)(B). The damages that the decision below authorizes would have a substantial and real impact on the operations of amici's members. By removing enormous amounts of capital from

the insurance system, such damages would inevitably harm the insurance marketplace.

In addition, the Ninth Circuit's decision has ramifications that extend well beyond the specific FCRA issues addressed below. The Act regulates insurers in several ways. Issues of first impression commonly arise under the FCRA, and as long as the Ninth Circuit's erroneous "willfulness" standard remains the law, insurers will face the prospect of severe class-action liability if a court later decides (in hindsight) that their answers to any unsettled FCRA questions are "implausible." The nature of the FCRA is such that any single interpretation of an FCRA requirement frequently affects millions of transactions yearly. If a court later decides that adherence to such an interpretation was reckless under the Ninth Circuit's new rule, statutory damages of $100 to $1000 might be available for each of those millions of transactions, resulting in potentially enormous liability.

This Court's review is therefore critical to protecting insurers from staggering damages that Congress never intended to impose.

CONCLUSION

For the foregoing reasons, this Court should grant the writs of certiorari and reverse the decisions of the Ninth Circuit.

Respectfully submitted.

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AUGUST 2006

(9) (7) (9) (2) File Aug. 21, 2006

Nos. 06-82, 06-84, 06-100, and 06-101

In The
Supreme Court of the United States

HARTFORD FINANCIAL SERVICES GROUP, INC., *et al.*,

Petitioners,

-vs-

JASON RAY REYNOLDS, *et al.*,

Respondents.

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

-vs-

CHARLES BURR, *et al.*,

Respondents.

[Additional Captions On Inside Cover]

On Petitions For Writs Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Case 06-100

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

Case 06-101

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

JULIE WILLES,

Respondent.

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size, in every industrial sector and from every region of the country.[1] A principal function of the Chamber is to advocate the interests of the business community by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

The Business Roundtable ("Roundtable") is an association of chief executive officers of leading American companies with over $4.5 trillion in annual revenues and more than ten million employees. The Roundtable's member companies comprise nearly one-third of the total value of the United States stock market, and represent nearly one-third of all corporate income taxes paid to the United States government. Collectively, the Roundtable's member companies returned more than $10 billion in dividends to shareholders and the American economy in 2005. The Roundtable is committed to advocating public policies which ensure vigorous economic growth and a productive workforce in America.

The Fair Credit Reporting Act ("FCRA") is a fundamental part of how business is conducted in this country. Nearly every type of commerce involves a party's credit history, for purposes as diverse as determining eligibility for mortgages, personal and business loans and other financial services; verification of educational records for licensing purposes; establishing an account for the purchase and service of telephones and other goods; and to confirm the identity, references and other background information of individuals seeking employment or promotion.

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[1] Pursuant to United States Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber and the Roundtable made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amici* brief, and their consent letters are on file with the Clerk of Court.

For this reason, the questions presented in these cases – namely, the scope of "adverse action" under the statute as it pertains to the sale of insurance, and the threshold of liability for "willful" violations of the FCRA – while of great concern to the nation's insurers, also go far beyond the provision of insurance to individual consumers. If left to stand, the Ninth Circuit's decision would unfairly expose the nation's businesses to liability for "willful" violations of the FCRA even when making a good-faith effort to comply with the statute; needlessly introduce uncertainty into countless transactions; and burden businesses and individuals alike with myriad unclear, even meaningless, notices under the FCRA.

The members of the Chamber and the Roundtable depend upon the procedures of the FCRA to accomplish all of these important purposes, and more. For the members of the Chamber and the Roundtable, it is therefore vital that the FCRA provide clear and consistent guidance as to a business' obligations when that business consults credit reports. And it is likewise important not only for every employer, merchant and service provider in the country – but for every consumer, employee and job applicant as well – that the required communications under the FCRA be understandable and helpful.

Accordingly, the Chamber and the Roundtable support the Petitions for Writs of *Certiorari* in these cases.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The case presents this Court with the opportunity to resolve a well-developed split between the Circuits concerning important, pervasive and recurring questions of federal law. The Ninth Circuit's holdings as to "adverse action" and "willfulness" under the FCRA are erroneous and pose devastating consequences for the daily transaction of business in this country. If left to stand, the Ninth Circuit's decision will needlessly introduce unfairness, uncertainty and confusion to all sectors of the American economy.

The Ninth Circuit's decision departs from both the unambiguous text of the FCRA and the case law established under that statute. Without intervention from this Court, the

Ninth Circuit's decision would dramatically expand the occurrences of "adverse actions" under the statute – rendering the accompanying "adverse action" notices to consumers so frequent and confusing as to be meaningless – and collapse the FCRA's express distinction between "willful" and non-willful violations of its terms.

The Ninth Circuit's Error as to "Adverse Action" under the FCRA

In the context of the sale of insurance, the FCRA expressly defines an "adverse action" as a denial, cancellation, increase in the change for, or change in the terms of coverage. Yet the Ninth Circuit's construction of "adverse action" ignores that statutory definition. Instead, the Ninth Circuit's decision expands the scope of "adverse action" to encompass any occasion in which an insurer consults a consumer's credit report and offers the consumer anything other than the insurer's best possible rate for insurance. That result is not only violative of the language of the statute, it also leads to absurd results.

The Ninth Circuit's definition of "adverse action" is confusing and impractical. No insurer can offer the lowest possible rate for its products to more than a small fraction of its customers (at least not while remaining in business). This fact alone would result in millions of consumers receiving "adverse action" notices for no reason other than that they were not offered the rate received by insurers' best customers. Still more puzzling is that the review of a consumer's credit report often leads the insurer to offer the consumer a better rate than would have been offered if the credit information had not been consulted. And yet, if that rate were anything less than the best available rate, the Ninth Circuit decision would require the insurer to send an "adverse action" notice to the consumer – despite the fact that both the consumer and the insurer were better off because of the use of the information in the credit report.

The impact of the Ninth Circuit's decision is also likely to be felt far beyond the insurance industry. The FCRA uses the same or substantially the same language to define "adverse action" in its provisions relating to other activities, including

the administration of regulatory licenses, eligibility for government benefits, and the use of credit reports for purposes of employment. As a result, the Ninth Circuit's decision can be expected to influence the construction of these related provisions of the statute. This would require the Ninth Circuit's "adverse action" notices to be sent in countless other contexts – including occasions in which an employer's review of a job applicant's credit report led to the offer of a more lucrative position than that in which the applicant was interested, but not the very best job offered to others.

The Ninth Circuit also erred by ignoring the plain language of the FCRA and announcing new components to be included in every "adverse action" notice. The FCRA clearly provides that only two pieces of information must be included in such a notice: (i) the contact information for the credit reporting agency which provided the report, and (ii) the recipient's right to receive a free copy of that report. But the Ninth Circuit's decision added to this list by also requiring an explanation of the specific "effect" of the action upon the consumer, as well as a series of disclosures regarding "affiliated" entities uninvolved with the particular transaction – if not also an identification of the exact information at issue in the report. The Ninth Circuit's decision further departs from the statute by imposing joint and several liability for the failure to craft an appropriate notice.

The Ninth Circuit's decision flies in the face of the FCRA's express mandate; is so ill-defined as to be difficult, if not impossible, for businesses to follow; invites litigation over the form of notice; and will cause confusion instead of reducing it.

The Ninth Circuit's Error as to "Willful" Violations of the FCRA

The FCRA contains a clear distinction between different levels of liability for "willful" and non-willful violations of its terms. A "willful" violation carries with it the potential liability for unlimited punitive damages, while non-willful violations are addressed by less severe remedies. Differentiating between the two levels of liability reflects a purposeful choice by Congress to treat more severely those who act to violate the

FCRA despite knowing (or intentionally blinding themselves to the fact) that their actions are unlawful.

The Ninth Circuit's decision construing these provisions of the FCRA effectively erases the distinction between "willful" and non-willful violations of the statute. The Ninth Circuit's decision redefines "willful" to encompass even actions which are negligent and unintended. Still worse, the Ninth Circuit's decision significantly erodes (if not eliminates) consultation with counsel as a defense against allegations of "willful" violations of the FCRA, and even invites discovery into the well-established privilege that protects confidential deliberations between attorney and client.

The Ninth Circuit's decision is also contrary to the well-reasoned case law of other federal Courts of Appeal which have considered this issue. A "willful" violation of the FCRA should be limited to incidents in which a party acts in derogation of the statute knowing that such actions are unlawful, or deliberately avoiding such knowledge. Consultation with counsel regarding unsettled areas of law under the FCRA ought to be a meaningful, if not dispositive, defense against a "willful" violation of the statute.

Other federal statutes which utilize the same or similar language and remedial structure as the FCRA – such as the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Family and Medical Leave Act – have been so construed by this Court, as well as by other federal courts (including the Ninth Circuit). But the Ninth Circuit's decision threatens those holdings and exposes the nation's businesses to inconsistent treatment of the same behavior. Indeed, the Ninth Circuit's decision would punish behavior which for other purposes is considered good-faith and even exculpatory.

If left undisturbed, the Ninth Circuit's decision will undermine the guidance provided by the FCRA to the nation's business community, and replace it with uncertainty as to how to prevent the devastating liability which can accompany "willful" violations of the statute.

REASONS FOR GRANTING THE WRITS

The Petitions for Writs of *Certiorari* should be granted. The Ninth Circuit's decision presents a well-developed split in authority between the Circuits, and is erroneous in two important ways: (1) its holding as to what constitutes an "adverse action" and corresponding notice under the statute; and (2) its holding as to what is a "willful" violation of the FCRA.

If permitted to stand, the Ninth Circuit's decision will introduce unfairness, uncertainty and confusion to the countless transactions which occur every day, in every part of the country, and in every sector of the economy.

I. THE NINTH CIRCUIT'S CREATION OF NEW "ADVERSE ACTION" STANDARDS IS ERRONEOUS AND HARMFUL TO BUSINESSES AND CONSUMERS

The Ninth Circuit's decision is a radical departure from the statutory bases for an "adverse action" under the FCRA. While Petitioners have articulated numerous reasons why the Ninth Circuit's decision is not based in law and how it will needlessly disrupt the provision of insurance, the full impact of the decision is hardly limited to the insurance industry. If left to stand, the Ninth Circuit's decision will influence the FCRA practices of all other industries which consult credit reports, leading to unfairly burdensome requirements and confusing communications to consumers in all sectors of the economy.

A. The Ninth's Circuit's "Adverse Action" Holding Would Harm Insurers and Their Consumers

The Ninth Circuit's decision is likely to mislead consumers rather than inform them. Under the Ninth Circuit's holding, an "adverse action" occurs each time an insurer declines to offer a consumer the "best possible rate," based in any way upon the contents of that consumer's credit report. *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1093 n.11 (9th Cir. 2006). However, it is infeasible for insurers to offer their "best possible rate" to more than a small percentage of their customers – at least, not while still hoping to stay in business. Accordingly, under the Ninth Circuit

decision, all other consumers seeking insurance – that is, the vast majority of consumers – would automatically receive an adverse action notice upon applying for insurance. *Id.*

This would be particularly misleading in instances when an insurer used a consumer's favorable credit report to offer the consumer a rate ***better*** than that which would have been offered but for the information obtained from the credit report. In such a case, the ***consumer benefits*** from a review of her credit report. Likewise, the ***insurer benefits*** from a better understanding of a potential customer and its own exposure to risk. And yet, under the Ninth Circuit decision, the insurer would be obligated to send the consumer an "adverse action" notice if the more attractive rate offered to the consumer was anything less than the insurer's "best possible rate."

That outcome disserves both the business and the consumer. Although the insurer obtained information which contributed to a more positive experience for the consumer, the insurer nevertheless would imperil the consumer's good will by sending the consumer a notice that the insurer had "acted adversely" toward her. In the same way, although the consumer is financially better-off because the insurer consulted her credit report, her receipt of an "adverse action" notice would lead her to believe the opposite were true. This is simply not what an "adverse action" should entail.[2]

This result is as much at odds with common sense as it is with the FCRA. The Ninth Circuit decision should not be allowed to stand.

B. The Ninth Circuit's "Adverse Action" Holding Would Harm Businesses, Consumers, Employees and Job-Seekers in All Industries

The Ninth Circuit's decision also imperils businesses and individuals in contexts other than the purchase of insurance.

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[2] For example, Black's Law Dictionary defines "adverse" as "opposed; contrary; in resistance or opposition to a[n] . . . application." Black's Law Dictionary 53 (6th Ed. 1990). Offering a consumer a better rate is hardly an action taken "in opposition to an application" or otherwise "adverse" to the consumer's interests. *Id.*

Most vulnerable to burdensome requirements and consumer confusion as a result of the Ninth Circuit's decision are parties involved in licensed occupations and the administration of government benefits, as well as employers across all fields of endeavor.

1. The Harm from Applying the Ninth Circuit's Holding to Government Instrumentalities

The statutory text erroneously construed by the Ninth Circuit in this case also appears in the provisions of the FCRA addressed to eligibility for governmental licenses and other state benefits. *See* 15 U.S.C. § 1681a(k)(1)(B). As such, the statute itself would appear to invite application of the Ninth Circuit's holding to those contexts, as well – thereby only compounding the confusion strewn by this incorrect decision.

Specifically, the FCRA defines "adverse action" in the insurance context as:

> ***[A] denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of*** coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

The FCRA uses the very same language to define "adverse action" as it relates to a "consumer's eligibility for a license or benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status:"

> ***[A] denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of,*** any license or benefit described in section 604(a)(3)(D).

See 15 U.S.C. § 1681a(k)(1)(B)(iii) (emphasis added).[3]

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[3] Section 604(a)(3)(D) of the FCRA provides that a person may obtain a consumer report for the purpose of determining a "consumer's eligibility for a license or other benefit granted by a governmental

(Continued on following page)

This identical statutory language, coupled with the paucity of case law construing Section 1681a(k)(1)(B)(iii) of the FCRA, raises the very real possibility that the Ninth Circuit's erroneous interpretation of what constitutes an "adverse action" will be imported to apply to governmental entities conferring licenses or benefits. Accordingly, those regulatory agencies – as well as the businesses and individuals who apply for those licenses and benefits – will find themselves in the same positions as insurers and applicants for insurance policies. Under the Ninth Circuit's "adverse action" mechanism, these activities, too, would be characterized by a deluge of unnecessary and confusing "adverse action" notices.

2. The Harm from Applying the Ninth Circuit's Holding to Employment-Related Background Checks

The statutory text erroneously construed by the Ninth Circuit is also shared by the sections of the FCRA regarding background checks in the context of applications for employment or promotion. Again, this renders the Ninth Circuit's errors unlikely to be contained solely within the market for insurance. To the contrary, the language of the statute facilitates the application of that erroneous decision to the nation's job-seekers in all fields of employment.

In particular, the FCRA defines "adverse action" in the insurance context as ***any "adverse or unfavorable change in the terms of"*** insurance coverage." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

Similarly, the FCRA defines "adverse action" in the employment context as any decision which ***"adversely affects any current or prospective employees."*** 15 U.S.C. § 1681a(k)(1)(B)(ii). That is, the FCRA treats an "adverse action" substantially similarly for both insurance and employment purposes: namely, it can be anything that adversely affects an individual's interests.

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instrumentality required by law to consider an applicant's financial responsibility or status." 15 U.S.C. § 1681b(a)(3)(D).

Consider the impact of applying the Ninth Circuit's holding to employers which conduct background checks for prospective and current employees. Nearly all employers in the United States fall into this category. According to the Society of Human Resource Management's "Reference and Background Checking Survey Report" (January 2005), approximately ***96% of all employers*** conduct background checks of some kind, including credit history reports, as to job applicants or employees.

Under the Ninth Circuit's holding, would all of these employers need to dispatch "adverse action" notices in every instance in which an applicant is not offered the "best possible position"? For example, if an individual indicates on his job application that he is interested in several different positions, and ultimately is hired for one of them (or even another position altogether), is there an "adverse action" if that position is somehow less desirable than the others in which he was interested? Or if that position is deemed relatively less attractive than the "best possible position"?

These results are equally as absurd as requiring an insurer to send an "adverse action" notice as a result of using an applicant's credit report to offer him a better rate on insurance. And yet that is exactly the confusion that the Ninth Circuit's decision would cause among the vast number of American employers who utilize background checks as a factor in their decisions to hire or promote.

3. The Harm from Applying the Ninth Circuit's Holding to Employment-Related "Pre-Adverse Action" Notices

Employers and job applicants would also feel the burden of the Ninth Circuit's decision in other ways. Specifically, the FCRA imposes upon employers who are contemplating taking an adverse action for an employment purpose the additional requirement of sending a "pre-adverse" action letter prior to actually taking the "adverse action." 5 U.S.C. § 1681b(b)(3). Under the Ninth Circuit's expansion of the amount of "adverse actions," so too would the number of "pre-adverse action" notifications dramatically increase.

In addition to the overwhelming burden upon businesses of trying to comply with such a regime, this poses two very real alternatives in the nation's workplaces. Either:

- Job applicants and employees alike would be inundated with "pre-adverse action" and "adverse action" notices such that their intended effect – allowing consumers to correct incorrect information before it could be acted upon – would be lost; or
- Employers would be inundated with inquiries regarding these "adverse actions" taken as to every job applicant, newly hired employee, promoted employee and employees who applied for promotion, to the detriment of activities that actually maintain and grow their businesses so that hiring can occur.

Both of these results are contrary to the FCRA, because they would render meaningless the statute's "adverse action" notice requirements. *See, e.g., Beck v. Prupis,* 529 U.S. 494, 506-07, 120 S. Ct. 1608, 1617 (2000) (restating "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous"); Hearing, Senate Committee on Banking, Housing & Urban Affairs, 108th Congress 95-96 (2003) (Testimony of J. Howard Beales III, Director of Federal Trade Commission) (consumers will ignore notices if received too frequently).

Nor would it be appropriate if this erroneous reading of the FCRA operated as a disincentive to employers to conduct background checks. Such inquiries are an important safeguard against ills which vary from theft and violence in the workplace, to identity theft, to liability for negligent retention or hiring. Moreover, the provision of such background screening services is itself a significant part of the American economy. *See, e.g.,* KPMG Corporate Finance LLC, "The Market is Undergoing Dramatic Change. What Are the Opportunities For Your Business?" Background Screening, Fall 2003 (employment-related background checks approximately a $2 billion annual business). There would be no avoiding the detrimental impact of the Ninth Circuit's decision upon all manner of employers, employees and job applicants.

C. The Ninth Circuit's Creation of New Requirements for "Adverse Action" Notices Is Erroneous and Harmful to Businesses, Consumers, Employees and Job-Seekers

The Ninth Circuit also erred by departing from the plain language of the FCRA and introducing new requirements for the contents of an "adverse action" notice. The text of the FCRA is unambiguous and detailed regarding what an "adverse action" notice must contain. *See* 15 U.S.C. § 1681m(a). The Ninth Circuit disregarded these clear standards, replaced them with ill-defined and confusing new requirements, and left open the possibility that still more could be added by judicial re-drafting of the statute.

The FCRA plainly states that upon taking an "adverse action" based upon a credit report, a business must provide the consumer with a notice that conveys two basic pieces of information about the "adverse action":

(1) The contact information of the consumer reporting agency which furnished the report, along with a disclaimer that such agency did not make the "adverse action" decision and is therefore unable to provide the reasons why the action was taken; and

(2) The consumer's right to receive a free copy of the report within sixty days, and to dispute inaccurate or incomplete information contained in the report.

15 U.S.C. § 1681m(a).

The Ninth Circuit's decision disregards these clear requirements and instead adds a third, which is found nowhere in the text of the statute: that the notice must also ***"specify the effect of the action upon the consumer."*** *Reynolds*, 435 F.3d at 1095 (emphasis added).

Still further beyond the statute, the Ninth Circuit also held that if an "adverse action" notice is issued by an entity belonging to a group of "affiliated" entities, the notice must also "describ[e] the adverse effect of [the] credit report within that family of companies," "identif[y] those companies and their respective roles," and "explain the actions each affiliated

company took." *Id.*, 435 F.3d at 1096. Under the Ninth Circuit's holding, failure to provide a conforming notice would result in ***"joint and several liability"*** among all such "affiliated" companies, even those which had no involvement whatsoever with the consumer or transaction at issue. *Id.* (emphasis added).

But the Ninth Circuit's novel construction of the statute does not even stop there. In a footnote, the Ninth Circuit invites the question of whether a notice should *also* contain "a fuller description of what specific information was adverse" to the consumer. *Id.*, 435 F.3d at 1095 n.14 (emphasis added).

The Ninth's Circuit decision is contrary to the most basic and long-established element of statutory construction: that an unambiguous statute means what it says. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 187, 124 S. Ct. 1587, 1596 (2004) ("Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction") (quoting *United States v. Fisher*, 6 U.S. 358 (1805)). For this reason alone, the Ninth Circuit's decision is erroneous and should be reversed.

But just as with the other aspects of the Ninth Circuit's holding, this is about more than an appellate court making a wrong decision. By fundamentally changing – and expanding – the required contents of an "adverse action" notice, the Ninth Circuit holding is poised to spread confusion throughout a far wider cross-section of the American economy than just the insurance industry.

To revisit an example discussed above, the Ninth Circuit decision would leave businesses guessing as to how to state the adverse "effect" upon an employee of being placed in a better job than she would have been eligible for if the business had not checked her credit report. Similarly confusing would be how to convey the adverse "effect" where a job applicant was offered the highest-paying job for which he applied, but not the highest-paying or otherwise "best" position which was available at the business. Add to this the need to identify and explain the workings of "affiliated" entities wholly removed

from the event at hand, and composing (much less deciphering) a compliant notice would be nonsensical, if not impossible.

And yet the failure to do so might be considered a "willful" violation of the statute, with attendant, potentially unlimited liability for entire groups of "affiliated" companies. No one – businesses, licensing agencies, employers, employees, or job applicants – would benefit from the Ninth Circuit's decision. All would be worse off for it.

II. THE NINTH CIRCUIT'S "WILLFULNESS" HOLDING IS ERRONEOUS AND HARMFUL TO BUSINESSES AND EMPLOYERS

The Ninth Circuit erred in its construction of the FCRA provision allowing for enhanced remedies in the event of a "willful" violation of the statute. 15 U.S.C. § 1681n(a). As addressed at length in the Petitions, the Ninth Circuit's holding is contrary to the bedrock principles of statutory interpretation and invariably leads to absurd and unfair results. For these reasons alone, the holding should be reviewed and reversed.

But of particular concern to the memberships of the Chamber and the Roundtable are two potentially devastating effects of the Ninth Circuit's holding: (1) the uncertainty caused by the Ninth Circuit's departure from the established case law of other federal courts of appeal; and (2) the risk of liability for actions which have consistently been treated as good-faith and exculpatory under other federal statutes which utilize the same language and remedial structure as the FCRA.

A. The Harm Caused by the Ninth Circuit's Erroneous Interpretation of a "Willful" Violation of the FCRA

The Ninth Circuit's novel and unfairly expansive definition of a "willful" violation of the FCRA presents businesses across all industries with uncertainty and the prospect of catastrophic liability, even for good-faith attempts to comply with the statute. That result ought not stand.

1. The Importance of Clearly Defined Rules of Liability

The FCRA plainly distinguishes between non-willful and "willful" violations of its terms. To this end, the FCRA specifically provides that in the event of "***negligent noncompliance***" with the statute, a business's liability is limited to a plaintiff's actual damages. 15 U.S.C. § 1681o (emphasis added). On the other hand, the FCRA expressly provides that in the event of "***willful noncompliance***" with the statute, a business's liability includes not only actual damages, but also a possible award of unlimited punitive damages. 15 U.S.C. § 1681n(a) (emphasis added).

This distinction is meaningful, yet the Ninth Circuit's holding threatens to collapse it by rendering even unintentional and well-meaning violations of the statute eligible for the imposition of exemplary damages. Such an outcome would be potentially devastating to all the businesses across the nation whose operations depend upon a clear understanding of the FCRA. Those businesspeople need to know – indeed, they deserve to know – whether they stand to be punished for good-faith reliance upon the advice of counsel regarding unsettled issues under the FCRA. By massively expanding liability under the FCRA, the Ninth Circuit not only ignores the plain meaning of the FCRA, but the well-reasoned holdings of other federal courts of appeal.

2. The Ninth Circuit's Holding Is Contrary to the Established Case Law of Other Federal Courts of Appeal

The Ninth Circuit's interpretation of a "willful" violation of FCRA is a significant departure from the prior case law construing that provision of the statute. Those decisions held that a violation is not "willful" if, before engaging in the conduct at issue, the defendant takes steps to ascertain whether its actions will be violative of the law.

For example, the Sixth Circuit has held that a defendant cannot "willfully" violate the FCRA if the defendant "obtained [the consumer's] reports 'under what is believed to be a proper purpose under the statute but which a court

. . . later rule[s] to be impermissible'" under the statute. *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (quoting *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 370 (6th Cir. 1984) (concurring opinion)).

Other federal Courts of Appeal have likewise limited "willful" violations of the statute to instances in which a party acts with the understanding that its actions are not permitted. In the words of the Eighth Circuit, a "willful" violation of the FCRA is nothing less than the "knowing and intentional commission of an act the defendant knows to violate the law." *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002). The Seventh Circuit has expressed this threshold in even more detail: "[t]o act willfully, a defendant must knowingly and intentionally violate the [FCRA], and it 'must also be conscious that [its] act impinges on the rights of others.'" *Wantz v. Experian Information Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) (citations omitted).

These cases are also entirely consistent with this Court's own articulation of the core concept that:

> ***punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.***

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521 (2003) (citations omitted) (emphasis added). For these reasons, this Court has repeatedly

> admonished that punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.

Id., 538 U.S. at 417, 123 S. Ct. at 1520 (internal quotation and citations omitted).

These cases, and this Court, have it right where the Ninth Circuit's decision has it wrong. In all of the FCRA cases

decided in other circuits, the defendant was protected from the most severe sanctions under the FCRA where the defendant lacked the knowledge that the actions at issue violated the statute. Of particular note – and particular importance to the business and legal communities – ***none*** of these cases suggest that a business can be subjected to such penalties for taking the advice of a lawyer regarding a matter of first impression under a statute, if a subsequent judicial decision reaches a different conclusion than that of the lawyer.

The Ninth Circuit's decision improperly inverts this state of affairs. By holding that reliance upon the advice of counsel "is not dispositive" of the issue of willfulness, the Ninth Circuit has eliminated the clear guidance that is vital to the FCRA and the businesses which operate under it. *Reynolds*, 435 F.3d at 1099. And the Ninth Circuit's decision stands to cause even more disruption, in that under the decision, "[w]hether or not there is a willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on . . . the testimony of the companies' executives and counsel." *Id.*

In other words, the Ninth Circuit's decision stands for the proposition that the mere allegation of "willfulness" may allow for discovery into the underlying legal advice and opinion, along with attendant erosions of the confidential relationship between attorneys and their clients. With one stroke, the Ninth Circuit decision eliminated any meaningful guidance and protection for businesses that must practice under the FCRA, increased the likelihood of litigation under the statute, and compromised the attorney-client relationship. That decision should not be permitted to stand.

B. The Uncertainty Caused by the Effect of the Ninth Circuit's Decision upon Other Statutes

The Ninth Circuit's decision is also likely to lead to uncertainty and inconsistent results under other federal statutes which utilize the same language and structure regarding "willful" violations of their terms. Like the FCRA, these statutes play key roles in regulating the nation's workplaces and jobs. If allowed to stand, the Ninth Circuit's decision would cause the same behavior –

conferring with counsel – to lead to dramatically different results under these substantially similar statutes.

1. The Age Discrimination in Employment Act

For example, the Age Discrimination in Employment Act ("ADEA") provides that "liquidated damages shall be payable only in cases of ***willful*** violations" of the statute. 29 U.S.C. § 626(b) (emphasis added). Like the FCRA, the ADEA does not expressly define "willful." *Id.*

In determining what is a "willful" violation of the ADEA, this Court held that "willfulness" was limited to instances in which the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126, 105 S. Ct. 613, 624 (1985). Accordingly, in the *Trans World* case, this Court reversed an award of liquidated damages because the employer conferred with counsel in attempting to determine whether its proposed actions would violate the ADEA. *Id.*, 469 U.S. at 130, 105 S. Ct. at 626.

This Court reaffirmed its definition of "willful" in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617, 113 S. Ct. 1701, 1710 (1993), and further explained that the statute's extra-compensatory damages provision did ***not*** apply where "an employer incorrectly but in good faith and non-recklessly believes that the statute permits a particular age-based decision." *Id.*

The Ninth Circuit's definition of "willful" under the FCRA is a distinct departure from this well-established level of culpability. Permitting that construction to stand would not only cause a split of authority under the FCRA, but also open a split between that statute and the ADEA. Businesses that make a good-faith effort to know and comply with these laws ought not be subjected to extreme penalties under one statute for the same behavior that is commended as exculpatory under the other.

2. The Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA") is another statute of the utmost importance to businesses and employees across the nation. *See* 29 U.S.C. Sec. 216(e). Like the ADEA, the FLSA also includes enhanced penalties for "willful"

violations of its terms, without providing a definition of what is a "willful" violation. *See* 29 U.S.C. §§ 216(e), 255(a) (extending limitation period for claims arising out of "willful violation" of statute), 626(b) ("liquidated damages shall be payable only in cases of *willful* violations" of statute).

Courts – ***including the Ninth Circuit*** – have consistently held that a "willful" violation of this statute requires cognition or deliberate indifference to the terms of the statute. As the Ninth Circuit itself held, a "willful" violation occurs only when the "employer disregards the very 'possibility' that it was violating the statute." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-09 (9th Cir. 2003).

The Ninth Circuit's decision in this case posits a markedly different view of "willfulness." Consultation with counsel should refute the contention that a possible violation of the statute was disregarded; but the Ninth Circuit's decision would enable "willful" violations to be found even after seeking legal advice. Again, given the substantial similarity of language and remedial schemes in the FCRA and the FLSA, a business should be treated similarly under both statutes. The Ninth Circuit's decision in this case undoes that result and leaves inconsistency and uncertainty in its place.

3. The Family and Medical Leave Act

Still another statute of general application, the Family and Medical Leave Act ("FMLA"), also provides for enhanced remedies in the event of a "willful" violation of its terms. *See* 29 U.S.C. § 2617(c)(2) (limitation period extended for claims arising out of "willful" violations of statute). And as with the other statutes discussed above, courts have held that a "willful" violation means "deliberately [choosing] to avoid researching the law's terms or affirmatively [evading] them." *Hoffman v. Professional Med. Team*, 394 F.3d 414, 419 (6th Cir. 2004).

A businessperson who consults with her counsel can hardly be said to have "deliberately chosen to avoid researching the law's terms or affirmatively evade them." Yet under the Ninth Circuit's holding in this case, the very same conduct could constitute a "willful" violation of the FCRA. There is no sense to be made of this dichotomy, and no guiding principles to be taken from it.

C. The Importance of Statutory Protection for this Nation's Businesses and Employers

There is no question that the FCRA and these other statutes provide important protections for consumers and employees. But these statutes ***also*** provide crucial protection for businesses and employers, by informing them how to conduct their business without transgressing the law. *See, e.g., Duffy v. Landberg*, 215 F.3d 871, 874-75 (8th Cir. 2000) (Fair Debt Collection Practices Act protects consumers, and compliance also protects businesses against liability); *see also Jang v. A.M. Miller & Assoc.*, 122 F.3d 480, 483-84 (7th Cir. 1997).

The Ninth Circuit's holding extinguishes this protection under the FCRA. The Ninth Circuit's holding divests the statute of any meaningful guidance for individuals and entities striving to ensure their compliance with the statute, while introducing needless risk, uncertainty and inconsistency into what had been a settled area of law upon which American businesses rightfully relied. The Ninth Circuit's holding should be reversed.

CONCLUSION

For all of these reasons, and those stated by the Petitioners, the Petitions for Writs of *Certiorari* should be granted.

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August 21, 2006

Nos. 06-82, 06-84, 06-100, 06-101

FILED
AUG 21 2006
OFFICE OF THE CLERK
SUPREME COURT

In The
Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY,

Petitioner

v.

JASON JAY REYNOLDS

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,

Petitioners

v.

CHARLES BURR, ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL.,

Petitioners

v.

AJENE EDO

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ET AL.,

Petitioners

v.

JULIE WILLES

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Financial Services Roundtable respectfully submits this brief as *amicus curiae* in support of the petitions for writs of *certiorari* in these four cases.[1]

INTEREST OF *AMICUS CURIAE*

The Financial Services Roundtable (Roundtable) represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers.

The Roundtable believes that the Ninth Circuit has gone far astray in its interpretations of the Fair Credit Reporting Act (FCRA). The Roundtable urges this Court to grant *certiorari* to address the scope of the statutory terms "adverse action" and "willfully." The Ninth Circuit's unprecedented construction of the term "adverse action" will significantly increase the number of notices that businesses must send to consumers under the FCRA, raising compliance costs for a host of industries without providing any material benefit to consumers. The Ninth Circuit's concurrent expansion of the term "willfully" to include mere recklessness has permitted class action lawsuits seeking statutory and punitive damages that could, in the aggregate, cost the insurance and other financial services industries billions of dollars, despite the absence of any showing of actual injury on the part of the plaintiffs.

The Roundtable therefore respectfully urges the Court to grant the petitions for writs of *certiorari* and to review

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[1] Letters from petitioners and respondents indicating their consent to the filing of *amicus curiae* briefs have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

and reverse the Ninth Circuit's errant judgments in these four cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues presented in these four petitions for writs of *certiorari* warrant review. This Court would benefit from granting *certiorari* in all four petitions because each petitioner could add valuable depth and focus to the statutory arguments in light of the factual circumstances present in each case. To the extent, however, that the Court is inclined to grant *certiorari* only in a single case and hold the other related petitions pending its disposition, the petition in *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, appears to be the best vehicle for the Court to review in order to correct the Ninth Circuit's erroneous interpretation of both the "adverse action" and "willfully" provisions of the FCRA.

I. A. Only a small number of consumers receive the lowest possible rate for insurance when those rates are based in part on information in a consumer report. The Ninth Circuit's unprecedented interpretation of the term "adverse action" in the FCRA to require notice to a consumer when an insurer issues him anything but the lowest possible rate will force insurance companies to issue tens of millions of pointless notices to consumers. That deluge of additional notices will provide consumers with little, if any, appreciable benefit, and may, in fact, harm consumers by overloading them with information and numbing them to the important notices they otherwise receive.

The Ninth Circuit's interpretation of "adverse action" in this case is contrary to the plain language of the FCRA. The FCRA adverse action requirements do not address a hypothetical comparison of the rate charged to a consumer with the rate available to all consumers with "more favorable" consumer report information. The statutory framework confirms this point.

There also is a risk that the Ninth Circuit's holding may be extended beyond insurance to credit transactions and other transactions governed by the FCRA, which would

increase the number of adverse actions notices astronomically, burying consumers in paper. The extension of the Ninth Circuit's erroneous interpretation to credit transactions could have a dramatic adverse effect on banks and other lenders.

B. The Ninth Circuit's holding that all parties who participate in a transaction that results in an adverse action are each liable for a failure to provide an adverse action notice finds no statutory basis in the FCRA. The Ninth Circuit's ruling threatens to expand the reach of FCRA liability to banks and other lenders for insurance transactions, far beyond the intent of Congress. The potential effect of such an interpretation would be significant.

II. The Ninth Circuit's substantial relaxation of the "willfully" requirement for the award of statutory and punitive damages under the FCRA imposes significant liability not intended by Congress. The Ninth Circuit held that, in order to establish the willfulness necessary to obtain these special damages, a plaintiff need not demonstrate that a defendant knew its action violated the FCRA, even though such knowledge is an essential part of the typical definition of willfulness employed when punishment is involved.

A. By adopting a more lenient standard than most (if not all) other circuits, the Ninth Circuit has become a magnet for nationwide class action lawsuits alleging a variety of technical violations of the FCRA. This is so because an allegation of "willfully" permits a plaintiff (or, more realistically, an attorney who identifies technical violations of the FCRA and then locates a plaintiff in whose name to sue) to demand statutory damages for certain FCRA violations of at least $100 and up to $1,000 on behalf of each member of a class, a remedy not available if such violations are negligent.

The driving force in this kind of case is not compensation for individual harm, but attorneys intent on extracting money for themselves and a class of uninjured consumers from companies that provide valuable services that may have engaged in unknowing technical violations of a complex regulatory statute. The size of these suits,

and the risk of hundreds of millions (if not billions) of dollars in statutory or punitive damages, sometimes can enable plaintiff attorneys to successfully obtain tens (if not hundreds) of millions of dollars in settlements from entities that can show they acted in good faith, but cannot be certain that they could defeat the Ninth Circuit's unorthodox standard of "willfully."

B. By reading the term "willfully" to encompass states of mind other than a knowing violation of the law, the Ninth Circuit ignored basic rules of statutory construction that weigh against such a low threshold for recovery of punitive damages. The rule of lenity applies to the "willfully" provision of the FCRA because it authorizes punitive damages, which impose penal sanctions. The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions also require the government to prove that a person acted "willfully" in order to establish criminal liability.

The structure of the FCRA also weighs strongly in favor of requiring a plaintiff to establish specific intent in order to recover punitive or statutory damages. In enacting the FCRA, Congress did not permit monetary remedies for every action that is later determined by a court to violate the FCRA. By limiting recovery of even actual damages to instances where a plaintiff can show a negligent violation of the FCRA, Congress necessarily understood that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff. The legislative history confirms that Congress rejected proposals permitting the award of statutory or punitive damages for gross negligence, a term often used interchangeably with recklessness.

Finally the requirement that a federal statute be read to avoid doubt about its constitutionality also supports an interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to not comply with the FCRA. The contrary interpretation of the term by the Ninth Circuit raises substantial questions

about the constitutionality of the statute in light of the Constitution's substantive limits on punitive damages awards. For offenses such as those created by the FCRA – which occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particular set of persons – the absence of a requirement that the defendants have engaged in conduct knowing that it was unlawful would draw into significant question every award of punitive damages under the FCRA.

ARGUMENT

The Ninth Circuit's published decision in *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, was applied immediately in several unpublished opinions issued the same day. That interpretation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, has produced four petitions for writs of *certiorari*: *Hartford Fire Ins. Co. v. Reynolds*, No. 06-82; *Safeco Ins. Co. of Am. v. Burr*, No. 06-84; *Geico Gen. Ins. Co. v. Edo*, No. 06-100; and *State Farm Mut. Auto. Ins. Co. v. Willes*, No. 06-101.

All four *certiorari* petitions challenge the Ninth Circuit's unduly expansive view of what showing is sufficient to establish that a defendant "willfully" violated the FCRA so as to trigger the availability of statutory and punitive damages. Each of the four petitions is an appropriate vehicle in which the Court could address that important question on which the circuits are divided because each of the Questions Presented on the "willfully" issue appears adequately broad to allow the Court to resolve all the necessary issues.

Three of the petitions also seek review of the Ninth Circuit's erroneous construction of a different and equally important provision of the FCRA that defines "adverse action" for various purposes, including for when businesses must provide certain notices to consumers. This "adverse action" issue affects the day-to-day operations of financial services entities subject to the FCRA and could pose substantial compliance burdens on them with no material benefit to consumers regardless of how the "willfully" issue is

resolved. These three petitions thus merit review by this Court on the adverse action issue as well.

This Court would benefit from granting *certiorari* in all four cases because each petitioner could add valuable depth and focus to the statutory arguments as well as useful clarity in light of the varied factual circumstances present in each case. To the extent, however, that the Court is inclined to grant *certiorari* only in a single case and hold the other related petitions pending its disposition, the petition in *State Farm*, No. 06-101, appears to be the best vehicle for the Court to address the "adverse action" and "willfully" provisions of the FCRA. The scope of the Question Presented in each of the petitions on the "adverse action" issue is somewhat different. The question in the *State Farm* petition,[2] however, is broad and encompasses the question in *Geico*.[3] Also, resolution of the question in *State Farm* is antecedent to the question in *Hartford*,[4] which focuses only on the required content of an adverse action notice and not on the threshold question of whether a notice is required.[5]

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[2] "Whether the Ninth Circuit Court of Appeals erred in interpreting key statutory terms in the definition of 'adverse action' in the Fair Credit Reporting Act, 15 U.S.C. § 1681a(k)(1)(B)(i), so as to expand the reach of that definition far beyond its plain meaning, thus substantially increasing the statutory obligations on insurance companies to notify consumers of purported 'adverse actions' and creating vastly expanded potential liabilities under the statute?" *State Farm*, No. 06-101, Pet. at i.

[3] "Whether the Ninth Circuit improperly expanded § 1681m of FCRA by holding that an 'adverse action' has occurred and notice is required thereunder, even when a consumer's credit information has had either no impact or a favorable impact on the rates and terms of the insurance that would otherwise have been offered or provided?" *Geico*, No. 06-100, Pet. at ii.

[4] "Whether the Ninth Circuit erred in creating new and open-ended disclosure requirements for adverse action notices beyond the discrete list expressly set forth in Section 615 of FCRA, 15 U.S.C. § 1681m(a)." *Hartford*, No. 06-82, Pet. at i.

[5] A factor that may become significant arose in the *Hartford* case subsequent to the filing of that petition. Hartford has informed the Securities and Exchange Commission that, after it filed its petition for *certiorari* in this matter, "the parties entered into a memorandum of

(Continued on following page)

I. Review Is Warranted To Correct The Ninth Circuit's Expansive Interpretation Of The FCRA's "Adverse Action" Definition, Which Otherwise Will Have A Substantial Negative Effect On The Conduct Of The Financial Services Industry Nationwide

The Ninth Circuit erroneously interpreted the term "adverse action" for purposes of the FCRA in a manner that is contrary to the plain language of the statute. In doing so, the Ninth Circuit held that any consumer who does not receive the lowest possible rate has suffered an adverse action, that every entity that participates in that action is liable for failure to provide an adverse action notice, and that each adverse action notice must contain detailed information far beyond that identified in the FCRA itself. The potential impact of this erroneous ruling on the insurance industry is quite significant, and its impact may extend far beyond to other industries as well.

A. The Ninth Circuit's Holding That The Failure Of A New Customer To Receive The Lowest Possible Rate Constitutes An "Adverse Action" By The Insurer Will Require The Issuance Of Millions Of Useless Notices And Is Wrong As A Matter Of Statutory Interpretation

Under the FCRA, if an insurance company takes an "adverse action" with respect to a consumer in connection with its underwriting decision, based at least in part on a consumer report that it obtained in connection with the underwriting under 15 U.S.C. § 1681b(a)(3)(C), the insurance company must provide the consumer with notice of the adverse action. *See id.* § 1681m(a)(1). The FCRA

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understanding setting forth the essential terms of a class settlement in this action. The settlement is subject to certain contingencies, including preliminary and final approval by the district court." The Hartford Financial Services Group, Inc., Quarterly Report (Form 10-Q), at 86 (July 27, 2006).

defines the term "adverse action" for insurance as "a denial or cancellation of, *an increase in any charge for*, or a reduction or other adverse or unfavorable change in the terms or coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." *Id.* § 1681a(k)(1)(B)(i) (emphasis added).

The Ninth Circuit erroneously held that the phrase "an increase in any charge for" insurance coverage includes an initial purchase of new insurance where the consumer is charged a rate that is higher than what the consumer would have been charged if his score, based on information from his consumer report, was the "top potential score." *State Farm*, No. 06-101, Pet. App. 43a. Under that interpretation, an adverse action occurs whenever a "consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable." *Ibid.*

1. The Ninth Circuit's unprecedented interpretation of the term "adverse action" to include issuance of anything but the best insurance coverage at the lowest possible rate will force insurance companies, and possibly other financial services institutions, to issue tens of millions of pointless notices to consumers.

The effect of the Ninth Circuit's holding on insurance companies will be dramatic. Only a small number of consumers will receive the lowest possible rate for insurance when those rates are based in part on information from the consumer reports. At many insurance companies that rely in part on such information to set rates, fewer than 15% of insureds receive the best rate available. *See* Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance*, Apps. C & D (2002). As a result, the Ninth Circuit's holding will require insurance companies to provide adverse action notices to nearly all consumers who purchase insurance, *i.e.*, all but the small group who have the "best" scores and receive the lowest possible rates. Because the majority of consumers nationwide must obtain automobile and/or homeowner's insurance, the Ninth Circuit's holding will require businesses to produce and send tens or hundreds of millions of additional adverse action

notices each year. *See* C.A. Br. for Property Cas. Ins. Ass'n of Am. as *Amici Curiae* Supporting Pet. for Reh'g *En Banc* at 2 (filed Nov. 14, 2005) (insurers in 2005 issued approximately 24 million homeowners policies and 48 million personal automobile policies using credit information).

Congress could not have intended such an absurd result. The Federal Trade Commission cautioned Congress to this effect when Congress was addressing revisions to the FCRA. It explained how important it was "to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong., 529 (2003) (testimony of Joel Winston, Associate Director, Bureau of Consumer Protection, Federal Trade Comm'n).

That deluge of additional notices will provide consumers with little, if any, appreciable benefit, and may, in fact, harm consumers. For example, the notices may confuse or mislead consumers who receive insurance at favorable rates because of their good credit histories, but not at the lowest possible rates. In addition, as more adverse action notices are provided, there is a real risk that the effectiveness of the notices intended by Congress will be substantially diluted. Consumers may begin to treat the notices as boilerplate disclosures that should be ignored. *See Senate Hearings*, *supra*, at 95-96 (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) ("[I]f you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore."); *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (discussing problem of "informational overload").

Also, the flood of additional notices will undercut their statutorily intended function – focusing consumers on potential material inaccuracies in their consumer reports. For example, a consumer with a good credit history who obtains insurance at a favorable rate, but receives an adverse action notice, could spend unnecessary time investigating a consumer report for material inaccuracies that do not exist.

2. The Ninth Circuit's interpretation of "adverse action" is contrary to the plain language of the FCRA. The relevant portion of the statute specifies that an adverse action occurs only if consumer report information is used, in whole or in part, to "increase [the] charge for" insurance coverage for that consumer. As a result, if a consumer receives *the same rate or a better rate* than she would have received if her consumer report information had not been considered, an adverse action has not occurred because the consumer report information did not result in an increase in the charge for the insurance coverage for that consumer.

The FCRA adverse action notice requirements are triggered when information in a consumer report has an actual and negative impact on a consumer's insurance rate. They do not address a hypothetical comparison of the rate charged to the consumer with the rate available to all other consumers with "more favorable" consumer report information.

The statutory framework confirms this point. Each adverse action notice entitles the recipient to a free consumer report from the consumer reporting agency. *See* 15 U.S.C. § 1681j(c). If Congress had intended the FCRA adverse action requirements to generate free consumer reports to nearly all consumers, Congress would not have needed to amend the FCRA in 2003 to require that consumer reporting agencies provide consumers with a free consumer report once each year upon request, *see id.* § 1681j(a)(1)(A), because the only consumers not already receiving them would be the small number of consumers with the top credit scores who have no need for them.

3. There is a risk that the Ninth Circuit's holding may be extended beyond insurance to credit transactions and other transactions governed by the FCRA, which would increase the number of adverse actions notices astronomically, burying consumers in paper. *Cf. Senate Hearings*, *supra*, at 48 n.15 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) (each day, two to three million consumer reports subject to the FCRA are issued).

Application of the adverse insurance ruling in this case should not apply in the context of credit because the FCRA

specifies that, in the credit context, the term "adverse action" "has the same meaning as in" the Equal Credit Opportunity Act. 15 U.S.C. § 1681a(k)(1)(A). That Act, in turn, defines "adverse action" to mean "a denial or revocation of credit," 15 U.S.C. § 1691(d)(6), and its implementing regulations make clear that if a consumer applies for credit at a specific rate but the lender makes a counteroffer at a different rate, there is no adverse action if the consumer accepts the lender's counteroffer, *see* 12 C.F.R. § 202.2(c).

There is yet another definition of "adverse action" in the FCRA, however, that at least one court has applied in the credit context. That definition of "adverse action" provides that an adverse action is one that is "made in connection with an application * * * made by, or a transaction * * * initiated by, any consumer" and is "adverse to the interests of the consumer." 15 U.S.C. § 1681a(k)(1)(B)(iv). Congress intended this "miscellaneous" definition to apply to transactions other than credit or insurance, as indicated by the transaction-specific definitions of adverse action and the legislative history. *See Senate Hearings*, *supra*, at 53 & n.46 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n). The Seventh Circuit, however, in a conclusory opinion that finds no basis in the statute, erroneously held that the "miscellaneous" definition can apply to credit transactions. *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 982 (7th Cir. 2004).

There is a significant risk that courts could conclude that, under the Ninth Circuit ruling at issue here, if a consumer is charged a rate for credit that is higher than the rate that the consumer would have been charged if his or her credit score was the "top potential score," the lender has taken an action that is "adverse to the interests of the consumer" within the miscellaneous definition of "adverse action" in the FCRA. The extension of the Ninth Circuit's erroneous interpretation to credit transactions could have a dramatic adverse effect on the compliance activities of banks and other lenders, similar to the effect of the Ninth Circuit's decision on insurance companies.

B. The Ninth Circuit's Holding That All Parties Who Participate In A Transaction That Results In An Adverse Action Are Liable For A Failure To Provide An Adverse Action Notice Threatens To Disrupt Settled Expectations Of The Financial Services Industry

The Ninth Circuit held that all parties who participate in an insurance adverse action are liable for any failure to provide an adverse action notice. *State Farm*, No. 06-101, Pet. App. 47a. The Ninth Circuit opined that Congress did not "intend[] that only a single company be responsible * * * when a consumer is charged an increased rate for insurance." *Id.* at 48a. The Ninth Circuit found that when a consumer is charged an increased rate for insurance and no adverse action notice is provided, the party that makes "the decision as to which of the" affiliated insurance companies will issue the policy will be subject to liability along with the company that issues the policy. This holding finds no statutory basis in the FCRA.

The Ninth Circuit's ruling threatens to expand the reach of FCRA liability for insurance transactions to banks and other lenders, far beyond the intent of Congress. Courts may be persuaded that a bank or other lender is deemed responsible, along with an insurance company, for the failure to provide an adverse action notice in connection with an "increase in the charge" for certain types of insurance coverage that are closely related to credit products. For example, a bank may obtain mortgage insurance to protect the bank from a borrower's default on a mortgage loan. If the bank selects the mortgage insurance company to underwrite the policy based on consumer report information, the Ninth Circuit's interpretation suggests that the bank could be liable under 15 U.S.C. § 1681s(b) along with the insurance company for failure to provide an adverse action notice if the rate charged for the mortgage insurance is not the lowest possible rate.

Similarly, if a consumer wishes to obtain credit-life or credit-disability insurance to protect against default on a credit product obtained from a bank and the bank selects

the insurance company that will receive the consumer's insurance application based on consumer report information, a bank might face liability under 15 U.S.C. § 1681s(b) in the Ninth Circuit if the rate charged for the insurance is not the lowest possible rate and no adverse action notice is provided.

The potential effect of such an interpretation would be significant. Banks and other lenders could find themselves facing enforcement actions for an insurance adverse action that they did not take.

II. Review Is Also Warranted On The Proper Interpretation Of The FCRA's "Willfully" Requirement To Correct The Ninth Circuit's Expansive And Erroneous Interpretation That Permits Recovery Of Unwarranted Punitive Damages And Enables Nationwide Class Actions For Statutory Damages

The Ninth Circuit's substantial relaxation of the "willfully" requirement for the award of statutory and punitive damages under the FCRA imposes significant liability not intended by Congress. The FCRA ensures that any individual who has been injured as a result of a negligent violation of certain of the FCRA's obligations is entitled to compensatory relief for that injury. 15 U.S.C. § 1681o(a)(1). In addition, where a defendant "willfully failed to comply" with such FCRA obligations, *id.* § 1681n(a), Congress authorized uncapped punitive damages and statutory damages of at least $100 and up to $1,000 for each consumer.

The Ninth Circuit held that in order to establish willfulness, a plaintiff need not establish that a defendant knew its action violated the law, even though such knowledge is an essential part of the typical definition of willfulness employed when punishment is involved. *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 196 (1998); *Ratzlaff v. United States*, 510 U.S. 135, 149 (1994). Instead, relying on a short line of cases that involve extending statutes of limitations and doubling lost wages awards for labor law violations, the Ninth Circuit held that a plaintiff can

establish that a defendant acted "willfully" by demonstrating that the defendant acted "either knowing that the policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *State Farm*, No. 06-101, Pet. App. 53a.

The Ninth Circuit acknowledged that its "reckless disregard" view of the *mens rea* required to establish "willfully" under the FCRA conflicts with both the Sixth Circuit and the Eighth Circuit. *State Farm* Pet. App. 54 n.17. As all the petitioners demonstrate, the Ninth Circuit's standard to determine "willfully" is also contrary to the great weight of other circuit authority.

A. The Ninth Circuit's Ruling Will Permit A Dangerous Array Of Class Actions Seeking Millions Of Dollars In Statutory Damages Without Any Proof Of Actual Harm

By adopting a more lenient standard than most (if not all) other circuits, the Ninth Circuit has become a magnet for nationwide class action lawsuits alleging a variety of technical violations of the FCRA. *See Safeco*, No. 06-84, Pet. at 13 & n.5 (citing recent filings); *see also Hartford*, No. 06-82, Pet. at 23 (hundreds of class actions alleging FCRA violations have been filed in the past two years). This is so because an allegation of "willfully" permits a plaintiff (or, more realistically, an attorney who identifies certain technical violations of the FCRA and then locates a plaintiff in whose name to bring a class action) to demand statutory damages of up to $1,000 on behalf of each member of a class, a remedy not available for negligent violations under Section 1681o.

By avoiding the need to establish actual damages, if any, incurred by each individual member of a class, a "willfully" allegation increases the likelihood that a class composed of a large number of individuals will be certified as a damages class action under Federal Rule of Civil Procedure 23(b)(3). *See, e.g., Ashby v. Farmers Ins. Co. of Oregon*, 2004 WL 2359968 (D. Or. Oct. 18, 2004) (class of at least 130,000 insureds); *Cavin v. Home Loan Ctr., Inc.*,

2006 WL 1313191 (N.D. Ill. May 10, 2006) (class of approximately 49,000 members); *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450 (W.D. Okla. Apr. 13, 2006) (class of over one million insureds).

Respondent Willes's complaint in the *State Farm* litigation, which is typical of other alleged FCRA violations plaintiffs seek to litigate as class actions, made no claim that petitioners' actions were negligent or that she personally suffered any actual damages. Instead, her complaint at the time it was dismissed by the district court alleged only willful misconduct and sought only statutory and punitive damages on behalf of a class. *State Farm* Third Amended Complaint (D. Or. Dkt. No. 35) at 4. The allegations in the three other FCRA cases in which *certiorari* petitions are pending are also silent as to the actual harm, if any, suffered by the named plaintiffs and likewise seek only non-compensatory damages for a class.

The driving force for such class actions is not compensation for individual harm, but attorneys intent on extracting money for themselves and a class of uninjured consumers from companies that provide valuable services (and their shareholders) that may have engaged in unknowing technical violations of a complex regulatory statute. *Cf. id.* at 4 ¶ 18 (respondent's counsel "are experienced in class action securities litigation").

The size of these suits, and the risk of hundreds of millions (if not billions) of dollars in statutory or punitive damages, sometimes can enable plaintiff attorneys to successfully obtain tens (if not hundreds) of millions of dollars in settlements from entities that can show they acted in good faith, but cannot be certain that they could defeat the Ninth Circuit's unorthodox standard of "willfully." *See* note 5, *supra*; Fed. R. Civ. P. 23, Advisory Committee's note (1998) (money class actions may force many defendants "to settle rather than incur the costs of defending a class action and run the risk of ruinous liability"); *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (class action for statutory damages "could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem*

effect on defendants, which may induce unfair settlements"); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.); *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995).

B. The Ninth Circuit Ignored That A "Willfully" Finding Triggers The Availability Of Punitive Damages, A Disfavored Penal Remedy Subject To Significant Constitutional Limitations

A finding that a defendant acted "willfully" allows an award of punitive damages in suits for all violations of FCRA that can be privately enforced. By reading the term "willfully" to encompass states of mind other than a knowing violation of the law, the Ninth Circuit ignored basic rules of statutory construction that weigh against such a low threshold for recovery of punitive damages.

1. Punitive damages are an "extraordinary sanction." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979). "[B]y definition [they] are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981). Punitive damages "serve the same purposes as criminal penalties," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003), and "have been described as 'quasi-criminal,'" *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citation omitted).

The rule of lenity applies to statutes that authorize punitive damages because punitive damages impose penal sanctions. *See* 3 Norman J. Singer, *Sutherland Statutory Construction* § 59.2, at 121 (6th ed. 2001) (collecting cases applying rule of lenity to statutes awarding punitive damages). The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions require the government to prove that a person acted "willfully" in order to establish criminal liability. *See* 15 U.S.C. §§ 1681q,

1681r; *Ratzlaff*, 510 U.S. at 143 ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

Thus, to the extent that the term "willfully" is ambiguous, it must be read narrowly for purposes of the felony provisions and the punitive damages provisions to protect defendants from punishment. *See Ratzlaff*, 510 U.S. at 148 ("were we to find [the statute's] 'willfulness' requirement ambiguous * * *, we would resolve any doubt in favor of the defendant"). The Ninth Circuit, however, in conflict with other circuits, rejected the reading most favorable to defendants and did not require that plaintiffs show that a defendant had a specific intent to violate the FCRA.

2. The structure of the FCRA weighs strongly in favor of requiring a plaintiff to establish specific intent in order to recover punitive damages. The FCRA is a technical statute that, even decades after its enactment, is still the subject of much uncertainty. When Congress uses the term "willfully" in such "highly technical statutes" that present "the danger of ensnaring individuals engaged in apparently innocent conduct," a defendant must know "that his conduct was unlawful" in order to be liable. *Bryan*, 524 U.S. at 194-195.

In enacting the FCRA, Congress did not permit monetary remedies for every action that is later determined by a court to violate the FCRA. By limiting recovery of even actual damages to instances where a plaintiff can show a negligent violation of certain FCRA provisions, Congress necessarily understood that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff.

Furthermore, the legislative history confirms that Congress rejected proposals permitting the award of statutory or punitive damages for gross negligence, a term often used interchangeably with recklessness. *See Safeco*, No. 06-84, Pet. at 20-21 (describing legislative history); *Geico*, No. 06-100, Pet. at 22 (same). For all these reasons,

the Ninth Circuit erred in not reading the FCRA "willfully" requirement to incorporate a specific intent standard.

The court of appeals disregarded this analysis and, instead, adopted the recklessness standard that this Court employed in interpreting the term "willful" in the Age Discrimination in Employment Act (ADEA) and the Fair Labor Standards Act. *State Farm*, No. 06-101, Pet. App. 53a (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). In neither of those statutes, however, does the willfulness determination trigger an award of punitive damages.

In one provision common to both statutes, at issue in *McLaughlin*, a willfulness finding extends the statute of limitations for bringing suit from two years to three years. *See* 29 U.S.C. § 255(a). In another provision under the ADEA, at issue in *Thurston* and *Hazen Paper*, a finding of willfulness permits a court to award an amount equal to the amount of lost wages as liquidated damages. *See* 29 U.S.C. § 626(b). That liquidated damages remedy, this Court has held, is "compensation, not a penalty or punishment" and serves as remuneration for "damages too obscure and difficult of proof," *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-584 (1942), and as a substitute for prejudgment interest, which is not available, *see Powers v. Grinnell Corp.*, 915 F.2d 34, 39-41 (1st Cir. 1990) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-716 (1945)). The Court made clear that the term "willful" in those statutes was ambiguous and that its meaning in any statute is dictated by the history and structure of the statute. *See McLaughlin*, 486 U.S. at 132-133 (reviewing structure of statute and legislative history); *Thurston*, 469 U.S. at 125-128 (same).

3. Finally, the requirement that a federal statute be read to avoid doubt about its constitutionality also supports an interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to not comply with the FCRA. The contrary interpretation of the term by the Ninth Circuit

raises substantial questions about the constitutionality of the statute in light of the Constitution's substantive limits on punitive damages awards.

The Due Process Clause prohibits unreasonable punitive damages awards and "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). In assessing reprehensibility, a court must consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Ibid.*

Under these factors, the FCRA requirement that a plaintiff establish that a defendant "willfully" failed to comply with the FCRA in order to be eligible for punitive damages must be interpreted to require proof that a defendant knew that its conduct violated the FCRA so as to not raise constitutional doubt. For offenses such as those created by the FCRA – which occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particular set of persons – the absence of a requirement that the defendant engaged in conduct "knowing or suspecting that it was unlawful" would draw into significant question every award of punitive damages under the FCRA. *Gore*, 517 U.S. at 576; *see id.* at 580 ("the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists").[6]

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[6] The FCRA authorization of statutory damages raises the same serious constitutional doubt under the Ninth Circuit's interpretation because the Due Process Clause prohibits the award of statutory damages that have no relationship to the amount of actual injury

(Continued on following page)

There is no basis in the text, structure, or history of the FCRA that would sustain the Ninth Circuit's minority view of "willfully." Yet given the availability of nationwide class actions, the Ninth Circuit's view will be the one to which defendants will often be subjected. Such a holding requires immediate review from this Court.

CONCLUSION

For the reasons set forth above and in the petitions for writs of *certiorari*, the Court should grant all the petitions. To the extent this Court grants a single petition, it should grant the petition in *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, and hold the remaining petitions pending decision in *State Farm*, and then dispose of them as appropriate in light of that decision.

Respectfully submitted,

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AUGUST 21, 2006

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suffered unless there is a showing of specific intent to violate the law. *See Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915) (statutory damages of $100 per day for refusing customer phone service violated due process when company's action was in good faith, impartially applied, consistent with longstanding practice, and done in the absence of any state ruling that conduct was unreasonable, rulings elsewhere that like conduct was reasonable, and weight of differing opinions on company's side); *see also Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (statutory damages of $500 for overcharging customer $3 violates due process because damages were "grossly out of proportion to the possible actual damages").

FILED
AUG 23 2006

Nos. 06-82, 06-84, 06-100, & 06-101

In the Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY, PETITIONER
v.
JASON RAY REYNOLDS, RESPONDENT

SAFECO INSURANCE COMPANY OF AMERICA, *ET AL.*, PETITIONERS
v.
CHARLES BURR, *ET AL.*, RESPONDENTS

GEICO GENERAL INSURANCE COMPANY, *ET AL.*, PETITIONERS
v.
AJENE EDO, RESPONDENT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *ET AL.*, PETITIONERS
v.
JULIE WILLES, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR FREEDOMWORKS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Fair Credit Reporting Act requires an insurance company to notify a consumer of an "adverse action" whenever it offers a policy at a rate greater than the rate the company might have offered if the consumer had perfect credit.

2. Whether an insurance company may be liable for punitive damages for "willful" violation of the Fair Credit Reporting Act based solely upon a finding that it acted with "reckless disregard" of the statutory notice requirement.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

In the decisions below, the Ninth Circuit has interpreted the Fair Credit Reporting Act (FCRA) in a way that not only conflicts with decisions in other circuits, but also, because of the Ninth Circuit's importance in our national economy, threatens to undo many of the benefits that FCRA has heretofore provided to both consumers and businesses nationwide. The Ninth Circuit's expansive interpretation of FCRA's notice requirement threatens to increase the costs of compliance for users of credit information while decreasing the likelihood that consumers will actually benefit from "adverse action" notices. Moreover, in its equally expansive interpretation of the "willfulness" standard for punitive damages, the Ninth Circuit has departed from the near-uniform position of other federal courts of appeals, opening the door to punitive awards even where users of credit information relied in good faith on the advice of counsel in determining their obligations under the statute. These results are not consistent with the text or structure of FCRA, and they threaten to disrupt the efficiency of the consumer credit market and increase the costs of credit nationwide—to the ultimate detriment of consumers. This Court's intervention is urgently needed to avoid that unfortunate result.

FreedomWorks Foundation, like its affiliate FreedomWorks (formerly known as Citizens for a Sound Economy), has a strong interest in these cases. It is a nonprofit, nonpartisan organization dedicated to promoting free-market solutions to economic problems at the state and national levels. Indeed, for more than two decades, FreedomWorks and its predecessors and affiliates have been a leading voice on a range of economic policy

issues, from taxation and regulation to entitlement reform, competitiveness, and consumer protection.[1]

FreedomWorks is especially interested in the proper interpretation and application of the Fair Credit Reporting Act (FCRA). In 2003, FreedomWorks' chief economist testified before a congressional subcommittee on the effectiveness of FCRA and the importance of uniform national standards for sharing financial information. See *Fair Credit Reporting Act: How It Functions for Consumers and the Economy: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 108th Cong. 66-68, 229-233 (2003) (statement and testimony of Wayne T. Brough). As he explained there, FreedomWorks believes FCRA has been instrumental in creating an efficient and highly integrated framework for sharing consumer credit information, a framework that has produced greater opportunities for consumers to obtain such credit. FCRA's success results from a well-considered policy not to restrict the free flow of information, but to provide reasonable standards that protect consumer privacy.

FreedomWorks believes this Court should grant review and reverse the decisions below to give FCRA the uniform nationwide interpretation that its plain terms require, and to ensure that the statute continues to foster the efficient consumer credit market that Congress contemplated.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

"In recent years, there has been a proliferation of class action lawsuits brought under the [FCRA]," in part because of "the availability of fee shifting and statutory damages, and the lack of a class action damages cap." David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006). In nationwide class actions, these statutory damages—$100 to $1000 per violation—threaten insurance companies and other covered entities with "crushing liability" that could have "adverse effects on both the national economy and * * * employees." *Trans Union LLC* v. *FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of certiorari).

The cases now before the Court are nationwide class actions filed in the District of Oregon. The named plaintiffs allege that their insurers (and all those companies' affiliates) willfully violated FCRA by failing to provide notice of "adverse actions" that resulted from evaluation of applicants' credit information. The named plaintiffs seek statutory damages of $100 to $1000 for each class member, as well as punitive damages and attorney's fees. The district court granted summary judgment in favor of the insurance companies, but the Ninth Circuit reversed.

The Ninth Circuit held that the defendants in these nationwide class actions were not entitled to judgment as a matter of law and that the named plaintiffs' claims should be decided by juries. *First*, the court adopted an expansive definition of "adverse action" for purposes of FCRA's notice requirement. FCRA provides that any person who "takes any adverse action with respect to any customer that is based in whole or in part on any information contained in a consumer report" must give "notice of the adverse action to the consumer." 15 U.S.C. § 1681m(a). With respect to insurance, the statute defines an "adverse action" as "a denial or cancellation of, an

increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B)(i).

According to the Ninth Circuit, "an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price." *Reynolds* v. *Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1091 (9th Cir. 2006). Thus, "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA" and must provide an adverse-action notice. *Id.* at 1092. According to the Ninth Circuit, FCRA "requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top *potential* score." *Id.* at 1093 (emphasis added).

Second, the court held that the insurance companies could be liable for "willful" violations of the notice requirement even if they sought, and relied on, the advice of counsel in determining that notice was not necessary. The statute provides that "[a]ny person who willfully fails to comply with any requirement under [FCRA] with respect to any consumer is liable to that consumer" for actual (or statutory) damages, punitive damages, and attorney's fees. 15 U.S.C. § 1681n.

Following the Third Circuit—but contrary to decisions of the Sixth, Seventh, and Eighth Circuits—the Ninth Circuit held that the term "willfully" in FCRA "entails a conscious disregard of the law, which means either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in *reckless disregard* of whether the policy [or action] contravened those rights." *Reynolds*, 435 F.3d at 1098 (emphasis added) (quotations omitted).

In adopting this reckless-disregard standard for willfulness, the court expressed concern about "perverse

incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 1099. "Because a reckless failure to comply with FCRA's requirements can result in punitive damages," the court reasoned, "insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute." *Ibid.* Under the Ninth Circuit's rule, a company's liability for punitive damages now depends upon whether its counsel's advice is "tenable, albeit erroneous" or "implausible" and "indefensible." *Ibid.*

SUMMARY OF ARGUMENT

The decisions below warrant review because they misinterpret FCRA in ways that will both impede the effectiveness of information-sharing in the consumer credit market and increase the cost of doing business. By requiring insurers to give notice to consumers whenever they charge a rate, based on the consumer's credit information, that is higher than the rate they would otherwise charge, the decisions below significantly increase the cost of FCRA compliance and effectively require that notice be given to every insurance applicant whose credit rating is less than perfect. Moreover, reading the statute to require notice to consumers in such a broad range of circumstances threatens to dilute the effect of credit-related notices that consumers *do* need to receive—by converting "adverse action" notices into white noise that consumers will come to ignore.

What is more, by lowering the bar of liability for "willful" violations, the decisions below impose significant burdens on insurance companies (and others) that merely use credit information for legitimate risk assessment purposes.

All of these results upset Congress's calibration of regulatory requirements and portend higher costs for

consumers seeking credit without providing them with corresponding benefits. And the effect will be felt by millions of consumers, because the notice requirement applies to all users of credit reports, the "adverse action" definition applies to all insurance companies that rely on credit reports, and the "willful" violation provision applies even more broadly—to every business that is covered by FCRA. Indeed, since these cases are nationwide class actions, the decisions below not only pose a danger of devastating liability for the insurance companies involved, but they may also effectively set nationwide standards of both liability and care.

Equally important, the decisions below represent a departure from the standards applied in most other courts of appeals throughout the country. Division among the courts of appeals on an issue affecting so many businesses itself warrants a grant of certiorari. Disparity undermines the chief virtue of FCRA—uniform standards governing national markets.

But the Ninth Circuit's decisions pose an additional threat. Given the circuit's expansive territory and the scope of the markets its rulings govern—comprising nearly 20 percent of the Nation's gross domestic product in 2004—the decisions below will also create extraordinary pressure for firms operating nationwide to conform their conduct in *all* jurisdictions to the court's broad reading of FCRA's notice requirements, simply to avoid having to enforce divergent notice policies in different offices. Thus, absent this Court's intervention, the Ninth Circuit's decision may, as a practical matter, be the last word on the standard that many companies apply in seeking to comply with FCRA. But that makes no sense: the authoritative interpretation of FCRA should come from this Court, not a single court of appeals that happens to have a large geographic jurisdiction.

ARGUMENT

The decisions below reflect fundamental misreadings of two key provisions of FCRA that affect millions of credit transactions nationwide. By construing the notice requirement to apply whenever a consumer obtains credit on terms less advantageous than might be available to a hypothetical "perfect" consumer, the decisions below impose significant burdens on users of credit reports while diminishing the utility of adverse-action notices to consumers. And by construing the term "willful" to include mere recklessness, the decisions below ensure that users of credit reports will face heightened risks of punitive damages liability that can be mitigated only by second-guessing the advice of counsel and interpreting FCRA in the most restrictive manner possible. The decisions below thus place on FCRA a judicial gloss that imposes significant additional compliance costs on businesses, but without corresponding benefits to consumers.

I. The Ninth Circuit's Expansive Reading Of FCRA's Notice Requirement Is Far Broader Than Congress Intended, To The Ultimate Detriment Of Consumers.

As this Court has noted, "Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001) (citing 15 U.S.C. § 1681(a)). To accomplish these objectives, the statute regulates "consumer reporting agencies" that generate "credit reports" for use in determining consumers' eligibility for credit, insurance, and employment. See 15 U.S.C. §§ 1681a, 1681b. Under the statute, reporting agencies are required to take steps to assure accuracy in credit information, to limit the disclosure of credit information to appropriate parties, and to give consumers access to their credit information so they can correct any mistakes. See *id.* §§ 1681(b), 1681b, 1681g.

In addition, FCRA regulates *users* of credit reports such as the insurance companies here. See *id.* § 1681m. Insurance companies, like other credit providers, use credit reports in assessing risks. Under FCRA, users of credit reports must give consumers notice of so-called "adverse actions" taken based on their credit information. *Id.* § 1681m(a)(1). As shown below, the Ninth Circuit has misinterpreted these provisions, and has done so in a way that threatens to destroy many of FCRA's benefits to consumers and businesses alike.

A. The Ninth Circuit's Interpretation Of FCRA's "Adverse Action" Provision Is Inconsistent With The Statutory Text.

FCRA defines "adverse action" in various commercial contexts, including the extension of credit, provision of insurance, employment decisions, and government licensing. See *id.* § 1681a(k)(1). In the insurance context, an "adverse action" is "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B).

Nothing in the statute, however, compels the Ninth Circuit's conclusion that an adverse-action notice is required "whenever a consumer pays a higher rate because his credit rating is *less than the top potential score*." *Reynolds*, 435 F.3d at 1093 (emphasis added). Indeed, the statute makes no reference to the hypothetical perfect credit rating. Rather, it focuses on a *change* in the price or terms of insurance offered to a specific consumer with specific actuarial characteristics as well as a specific credit rating. If a consumer receives an offer of insurance at a certain price and on certain terms based on non-credit-related characteristics, he is adversely affected by his credit rating only if the insurer, after considering the credit rating, *changes* the offer by raising the price or reducing the coverage or otherwise making the terms less

favorable. The relevant comparison is between (1) the consumer described by all his characteristics except his credit rating and (2) the same consumer described by all his characteristics including his credit rating. It is not between the real-life consumer and the Platonic Form of creditworthiness.

B. The Ninth Circuit's Interpretation Of FCRA's "Adverse Action" Provision Undermines The Policy Objectives Of The Statute.

Not only does the Ninth Circuit's rule exceed the plain meaning of the statute and defy common sense, but it also upsets the delicate balance of interests that Congress struck when it enacted the statute. Congress enacted FCRA recognizing that "[t]he banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

1. Reliable credit information is essential to risk assessment and pricing decisions in the consumer credit market. As FreedomWorks' chief economist has explained, there is "a strong statistically significant correlation" between "credit scores [and] loss." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 232 (testimony of Wayne T. Brough). "Overall, research and creditor experience has consistently indicated that credit reporting company information, despite any limitations that it may have, generally provides an effective measure of the relative credit risk posed by prospective borrowers." Robert B. Avery, *et al.*, *An Overview of Consumer Data and Credit Reporting*, Federal Reserve Bulletin 47, 51 (Feb. 2003).

Thus, it should come as little surprise that insurance companies use credit information for legitimate risk-assessment purposes:

> [I]nsurance companies have used the information in credit scores as a risk characteristic to help predict future losses. This allows companies to price products more efficiently, while covering their costs. Risk classification allows insurers to divide individuals into groups with similar claims and set prices based on the probability of future loss. Driving history, age and gender are common variables to classify risk, but increasingly insurance scores with credit have been found to be more reliable predictors of future risk.

Fair Credit Reporting Act: How It Functions for Consumers and the Economy, supra, at 67 (statement of Wayne T. Brough).

Insurers' use of credit information helps consumers in two distinct ways. First, it enables insurers to set prices for insurance based on likely risk, which keeps them from setting prices unnecessarily high. "Restricting credit history information as an underwriting tool," by contrast, "would result in higher costs for insurers and higher premiums for policyholders." *Id.* at 233 (testimony of Wayne T. Brough).

Second, use of consumer credit histories improves the fairness of risk classification and thereby increases the availability of insurance to classes of consumers who otherwise might go without coverage. "[W]hen consumer credit histories are used as an underwriting criterion, they tend to increase the fairness and accuracy of risk classification. * * * With the ability to classify risk more accurately, insurers gain the ability to provide a wider array of products that can be offered to customers they otherwise could not serve." *Id.* at 232 (testimony of Wayne T. Brough).

2. This is in keeping with Congress' own goals in passing FCRA. Even as Congress recognized that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers," it sought to respond to the

"need to [e]nsure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(3)-(4). Thus, FCRA reflects Congress' judgment on the appropriate balance of efficiency in the credit market and reasonable consumer protection: it "strikes a balance between the privacy interests of consumers with respect to the contents of their credit reports and the need of businesses to access the information required to make accurate real time assessments of consumer qualifications." S. Rep. No. 108-166, at 5 (2003).

FCRA promotes efficiency in the consumer credit market by maintaining credit providers' ability to make decisions based on consumers' actual experiences. At the same time, however, FCRA protects consumers by ensuring that they are made aware of the impact of their credit reports in the marketplace. Indeed, FCRA's notice requirement facilitates the free flow of information by requiring users of credit information to alert consumers when they are "taxed"—by higher rates or less favorable terms—because of their credit ratings. These adverse-action notices benefit consumers by (1) showing them how their credit standing affects their position in the marketplace, and (2) enabling them quickly to identify and correct errors in their credit reports.

The balance that Congress struck in FCRA between allowing businesses to use credit histories while providing consumers with notice of genuinely adverse credit-related actions has been vindicated by the performance of the nation's consumer credit market. Credit is available to more consumers today than ever before, undoubtedly (at least in part) because FCRA created a uniform national system of credit reporting that promotes efficiency in information-sharing, accuracy in risk assessment, and privacy for consumers. As one Federal Reserve Board official told Congress: "The ready availability of accurate, up-to-date credit information from consumer reporting

agencies benefits both creditors and consumers. Information from consumer reports gives creditors the ability to make credit decisions quickly and in a fair, safe and sound, and cost-effective manner. Consumers benefit from access to credit from different sources, vigorous competition among creditors, quick decisions on credit applications, and reasonable costs for credit. *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 431 (testimony of Dolores Smith).

3. By requiring insurers to notify consumers of an "adverse action" every time insurers use consumer credit histories as a basis for charging a rate higher than the lowest hypothetical rate, the Ninth Circuit's reading of FCRA increases the cost of using such credit information and threatens harm to consumers both in the form of increased prices and decreased availability for those who are at risk of not getting coverage. This Court's review is warranted to prevent that result.

Moreover, gratuitous adverse-action notices actually *undermine* the important functions that Congress intended such notices to perform. The more notices a consumer receives, the less importance he will attach to any particular notice and the less attention he will pay to all such notices. As the director of the Federal Trade Commission's Bureau of Consumer Protection has explained, "if you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore. The adverse action notice, as it was originally envisioned, fit well in the set of circumstances where consumers needed to pay attention to the credit report and did not raise a lot of false alarms." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing, & Urban Affairs*, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III).

By requiring that notice be given "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *Reynolds*, 435 F.3d at 1093, the Ninth Circuit has ensured that there will be "a lot of false alarms" that will only devalue appropriate adverse-action notices. And by requiring that such notices identify *every affiliated entity* that participates in setting premium rates, see *id.* at 1096, the Ninth Circuit has ensured that consumers will be flooded with gratuitous information concerning a single transaction. Under the court of appeals' view, credit notices that consumers would ordinarily want to know about will be drowned out by the white noise of numerous meaningless reports that the court's expansive interpretation of "adverse action" requires.

In sum, the decisions below substitute the Ninth Circuit's theory of regulation for Congress' judgment on national economic policy. Requiring notice virtually every time an insurance company provides an initial policy—even when the consumer's credit information had no impact or a favorable impact on his ability to obtain credit—amounts to over-regulation that imposes additional costs on insurance companies without delivering additional benefits to consumers. This Court should grant the petitions to give a uniform interpretation to FCRA's notice requirement, one that is consistent with Congress' policy objectives and protective of consumers' interests in obtaining credit.

II. Contrary To The Decisions Of Most Other Circuits, The Decision Below Subjects Covered Businesses To Punitive Damages For Unwitting Violation Of FCRA's Requirements, Thereby Increasing The Cost Of Credit To All Consumers.

The Court should grant review for the additional reason that the decisions below aggravate a conflict among the federal courts of appeals on the meaning of the term

"willful" in FCRA. The Act subjects insurance companies to liability for actual damages, statutory penalties, *punitive damages*, and attorney's fees for "willful" violations of statutory requirements. See 15 U.S.C. § 1681n(a). As this Court has explained, "willful" is a term of "many meanings," and its proper interpretation is "often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998); *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *Spies* v. *United States*, 317 U.S. 492, 497 (1943).

In FCRA, Congress made a considered decision to reserve the drastic remedies of penalties and punitive damages for only the most egregious violations. The original Senate bill required the plaintiff to show that the defendant was "grossly negligent" to obtain *actual* damages, and that the violation was "willful" to obtain *punitive* damages. See S. 3678, 91st Cong. §§ 616, 617 (1970). Because gross negligence is equivalent to recklessness, see *Restatement (Second) of Torts* § 282 cmt. e (1965), the effect of the Senate bill was to distinguish misconduct that was merely reckless from misconduct that was more egregious, *i.e.*, "willful." Likewise, the House distinguished recklessness from willfulness, rejecting alternative versions of FCRA that would have authorized punitive damages for violations that were "grossly negligent or willful." See H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970). Thus, it was the unmistakable intention of Congress to set apart conduct that was more egregious than gross negligence (or recklessness) for punitive damages liability.

This policy is also manifest in FCRA's structure. For example, Section 1681n authorizes damages for "willful" violations in two different circumstances. For "willful" violations of most FCRA requirements, the statute provides that the consumer may receive actual damages of "not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). For "willful" violations of the prohibition against "obtaining a consumer report under false

pretenses or knowingly without a permissible purpose," the statute provides that the consumer may receive the greater of her actual damages or $1,000. *Id.* § 1681n(a)(1)(B). Because (1) "willful" must have the same meaning in both circumstances, see *Ratzlaf*, 510 U.S. at 143, and (2) the statute speaks of "willful" violation of a prohibition against obtaining a consumer report "*knowingly* without a permissible purpose," the term "willful" must entail *at least* actual knowledge in this context as well.[2]

Consistent with the legislative history and statutory structure, most federal circuits that have addressed the issue have concluded that a defendant may be liable for "willful" violation of FCRA only where it knowingly and consciously violated statutory mandates. *E.g.*, *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357 (8th Cir. 2002); *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409 (4th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424 (6th Cir. 1998); *Stevenson* v. *TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993).[3] As the Eighth Circuit explained in *Phillips*, "the defendant must commit the act that violates the Fair Credit Reporting Act with knowledge that he is committing the act * * * *and* he must also be conscious that his act impinges on the rights of others." 312 F.3d at

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[2] FCRA also provides a criminal penalty for "any person who *knowingly and willfully* obtains information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q (emphasis added).

[3] Although the Third Circuit previously adopted a "reckless disregard" standard, even that court recognized that a defendant's conduct must be "on the same order as willful concealments or misrepresentations" to warrant punitive damages. *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).

368 (emphasis added). Thus, in most federal circuits, a company cannot be liable for punitive damages where it mistakenly, but not deliberately, violates FCRA's notice requirement.

Not only does the Ninth Circuit's expansive interpretation of "willful" conflict with the interpretation uniformly applied by these other circuits, but it also creates significant practical problems for covered businesses and their counsel. Under the Ninth Circuit's rule, a business subject to FCRA may be charged with a "willful" violation—and thus be subject to punitive damages—*even if it did not know that it was violating the statute at all*, and even if it was merely following the advice of counsel on an unsettled legal issue under the statute.

Perhaps even more troubling is the Ninth Circuit's suggestion that a user of credit reports is subject to punitive damages for violating FCRA if its counsel's advice is "untenable" or "implausible" in the eyes of the court of appeals, *regardless of the fact that the district court agreed with its counsel's interpretation of the statute*. Indeed, the district court in these cases granted the insurance companies judgment as a matter of law on the ground that their interpretation of FCRA was correct.

Moreover, the burden appears to rest on the *defendant* to refute the claim for punitive damages: According to the Ninth Circuit, a business may be liable for punitive damages unless it "diligently and in good faith" sought to determine its statutory obligations and "thereby" took a "reasonable" or "tenable" position under the statute. *Reynolds*, 435 F.3d at 1099. Under this rule, the named plaintiff need do no more than assert that the defendant "willfully" (or without a good-faith basis) violated FCRA to survive a motion to dismiss.

This result increases the likelihood that covered businesses will bear the costs of punitive damages awards, either by paying large judgments or by entering into

"blackmail settlements" reflecting the potential for a high punitive award. As Judge Easterbrook has explained, settlement in such large-scale litigation "becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." See *In re Bridgestone/ Firestone, Inc.*, 288 F.3d 1012, 1015-1016 (7th Cir. 2002); see also Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) ("[w]hile the benefits to the individual class members are usually minuscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled").

In addition, this result will compel businesses to incur additional costs, either in conducting their operations in the most conservative manner, or in obtaining "second opinions" to test their own counsel's advice. This Court has recognized that, "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." *Upjohn Co.* v. *United States*, 449 U.S. 383, 392 (1981) (quotations omitted). And that is especially true in areas where compliance is "hardly an instinctive matter." *Ibid.* There is a cost associated with asking lawyers to approve business practices, and a risk associated with not asking. The pernicious effect of the decisions below is to *increase the cost* of the most responsible corporate behavior—consulting legal counsel before engaging in business practices regulated by federal statute. See *ibid.* (acknowledging the "valuable efforts of corporate counsel to ensure their client's compliance with the law").

These costs undoubtedly will be passed on to consumers, who will receive no additional benefit beyond that which ordinary remedies would provide. Here again, then, the decisions below amount to over-regulation by a court, inconsistent with the careful balance of interests that Congress struck when it enacted FCRA. The Ninth

Circuit's decisions undermine Congress' choice to reserve punitive damages for deliberate, conscious misconduct and conflict with the decisions of most other federal circuits, to the certain detriment of consumers nationwide. This Court should grant review to resolve the settled conflict among the courts of appeals and to establish a single standard for punitive damages liability under FCRA.

III. The Decisions Below Are Of Enormous Practical Importance Not Only To The Financial Services Industry, But To Consumers Of Their Services.

The practical impact of the decisions below also weighs heavily in favor of review. FCRA touches millions of consumer credit transactions each day, and it affects the routine business operations of banks, credit unions, insurance companies, mortgage lenders, and retailers nationwide. Given the scope of the statute's operation and the importance of consumer credit to our economy, the effects of the decisions below will reach far beyond the particular transactions at issue in these four cases. Indeed, as FreedomWorks' chief economist has explained: "[FCRA] has allowed the United States to develop one of the most efficient and sophisticated financial services markets in the world. Seventy-five percent of all households are participants in the market for consumer credit or mortgages." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 66 (statement of Wayne T. Brough).

Because FCRA regulates enormous numbers of credit-related transactions, the decisions below likely will spawn massive amounts of new litigation, the costs of which ultimately will be borne by consumers. "Each of the three national credit reporting companies has records on perhaps as many as 1.5 billion credit accounts held by approximately 190 million individuals. Credit reporting companies generally receive information from creditors and others every month, and they normally update their

credit records within one to seven days of receiving new information. According to industry sources, each of the three national credit reporting companies receives more than 2 billion items of information each month." Avery, *et al.*, *supra*, at 49. That is ample fodder for FCRA litigation, and because FCRA does not cap the amount of damages recoverable in a class action, the Court can be certain that new litigation will be large-scale and very expensive. See D. Permut & T. Moore, *supra*, at 931.

Moreover, simply because of the sheer size of the Ninth Circuit's territory in relation to the national economy, the decisions below likely will force financial services companies to modify or curtail their activities on a nationwide basis, resulting in further harm to consumers. In 2004, the nine States comprising the Ninth Circuit had gross state products totaling more than $2.3 trillion—nearly 20 percent of the Nation's gross domestic product for that year.[4] California's gross product alone was nearly $1.5 trillion,[5] making California's the sixth-largest economy in the world.[6] Insurance-related activities contributed more than $42.5 billion to the economies of the States comprising the Ninth Circuit,[7] and in 2005 more

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[4] See United States Department of Commerce, Bureau of Economic Analysis, *Gross State Product*, available at http://www.bea.gov/bea/regional/gsp.htm (visited Aug. 21, 2006).

[5] See *id.*

[6] See California Legislative Analyst's Office, *CalFacts 2004: California's Economy and Budget in Perspective*, available at http://www.lao.ca.gov/2004/cal_facts_2004_calfacts_econ.htm (visited Aug. 21, 2006).

[7] See Bureau of Economic Analysis, *supra*.

than $91.4 billion in direct premiums for property and casualty insurance were written in these States.[8]

To compensate for the added costs of providing gratuitous adverse-action notices and obtaining multiple legal opinions before engaging in practices regulated by FCRA—as required by the Ninth Circuit's decisions—banks, insurance companies, and other covered businesses may change the terms of the credit they extend or the prices or availability of products they sell to consumers nationwide. As a result, if the decisions below are allowed to stand, fewer consumers will have access to credit on terms advantageous to them.

* * * * *

The decisions below rest on fundamental misreadings of FCRA that significantly increase the costs of compliance with the statute. Users of credit reports and other covered businesses will pay those costs, but only in the first instance. They will pass those costs on to consumers, for whose benefit FCRA was enacted, in the form of higher prices and a narrower range of coverage. The decisions below thus amount to judicial over-regulation of the consumer credit market, and they should not be permitted to jeopardize FCRA's continued success in promoting the free flow of credit information while protecting consumer privacy.

CONCLUSION

The petitions for a writ of certiorari should be granted.

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[8] See Insurance Information Institute, *Direct Premiums Written, Property/Casualty Insurance By State, 2005*, available at http://www.economicinsurancefacts.org/economics/state/premiums.htm (visited Aug. 21, 2006).

Respectfully submitted.

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AUGUST 2006

Supreme Court, U.S.
FILED
AUG 21 2006
OFFICE OF THE CLERK

Nos. 06-82, 06-84, 06-100, and 06-101

IN THE

Supreme Court of the United States

HARTFORD FIRE INS. CO.,

Petitioner,

v.

JASON RAY REYNOLDS,

Respondent.

[Captions continued on inside cover]

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE MORTGAGE INSURANCE COMPANIES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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[Captions continued from outside cover]

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

STATE FARM MUT. AUTO. INS. CO., ET AL.,
Petitioners,

v.

JULIE WILLES,
Respondent.

SAFECO INS. CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

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INTEREST OF THE *AMICUS CURIAE* [1]

The Mortgage Insurance Companies of America ("MICA") is a non-profit trade association that represents the private mortgage insurance industry in the United States. Its members are United Guaranty Corporation, Genworth Mortgage Insurance Corporation, Mortgage Guaranty Insurance Corporation, PMI Mortgage Insurance Co., Republic Mortgage Insurance Co., and Triad Guaranty Insurance Corporation.

MICA's members provide private mortgage insurance to mortgage lenders. Mortgage insurance protects a lender if the homeowner defaults on the loan. It allows those lenders to make low-downpayment loans, thereby expanding homeownership opportunities and enabling millions of Americans to become homeowners. Taken together, the private mortgage industry's seven companies insure over five million mortgages nationwide.[2]

MICA works to enhance understanding of the vital role that private mortgage insurance plays in housing Americans and of the issues faced by the mortgage insurance industry. Among MICA's missions is providing information to decisionmakers on issues concerning the obligations of companies that provide mortgage insurance. As such, MICA participates as *amicus curiae* in cases that may substantially affect such companies. See, *e.g.*, *Verex Assurance, Inc. v. Palma*, 519 U.S. 1048 (1996) (granting MICA's motion for leave to file an *amicus curiae* brief).

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[1] Written consents of all parties have been filed with the Clerk. This brief was authored solely by counsel for MICA, and no person or entity other than MICA, its members, or its counsel made any monetary contribution to the preparation or submission of the brief.

[2] The seventh company, Radian Guaranty Co., is not currently a member of MICA.

Mortgage insurers write policies with premium terms that may vary based on, among other things, information about the potential homeowner's creditworthiness. As a result, MICA's members have a strong interest in having this Court immediately review and correct the Ninth Circuit's decision for three reasons.

First, each of MICA's members has recently been sued in putative class actions arising under the Fair Credit Reporting Act ("FCRA") in which the plaintiffs allege, *inter alia*, that the mortgage insurers willfully violated FCRA by not providing notices of adverse action when the mortgage insurance policy premiums were affected by the borrowers' credit scores.[3] The Ninth Circuit's decision addresses issues that are also raised by those lawsuits, including the proper standard for determining whether any FCRA violation was willful, thus subjecting the defendant to punitive sanctions. Indeed, shortly after the Ninth Circuit's initial opinion was issued, it was cited by the plaintiffs in two of the cases pending against private mortgage insurers.[4]

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[3] See *Glatt v. PMI Group, Inc.*, No. 2:03-CV-00326-JES (M.D. Fla.); *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky.); *Preston v. Mortgage Guar. Ins. Corp. of Milwaukee*, No. 5:03-CV-111-Oc-10GRJ (M.D. Fla.); *Price v. United Guar. Residential Ins. Co.*, No. 3:03-CV-2643-R (N.D. Tex.); *Portis v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-300 (N.D. Ill.); *Karwo v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-1944 (N.D. Ill.); *Brantley v. Republic Mortgage Ins. Corp.*, No. 04-CV-805 (D.S.C.). In addition, a similar case is pending against Radian. *Whitfield v. Radian Guar. Co.*, No. 05-5017 (3d Cir.).

[4] See Plaintiff's Notice of Supplemental Authority, filed in *Whitfield v. Radian Guar., Inc.*, No. 04-111 (E.D. Pa. Aug. 11, 2005); Plaintiff's Notice of Supplemental Authority in Opposition to Triad's Motion for Summary Judgment, filed in *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky. Aug. 19, 2005).

Second, because the decision below conflicts with prior decisions from other Circuits, review is necessary to prevent forum shopping in future cases involving MICA's members. Mortgage insurers write policies covering properties located across the country, thereby raising a grave risk of forum shopping if the circuit split demonstrated in the petitions is allowed to persist.

Finally, beyond its effects on litigation, the Ninth Circuit's ruling would cause substantial harm to the private mortgage insurance industry and American homeownership. As explained below, the decision affects all aspects of FCRA, not just issues relating to adverse action notices, and will pressure mortgage insurers to consider adopting overly cautious practices in order to avoid the risk of punitive damages. The inevitable result of unnecessarily conservative approaches will be a restricted flow of consumer information, higher costs, and a decreased availability of risk-based priced mortgage insurance.[5]

ARGUMENT

The petitions in these cases correctly demonstrate that the Ninth Circuit's ruling both directly conflicts with decisions of numerous other courts of appeal and is patently wrong as a matter of statutory construction. The Ninth Circuit incorrectly construed the word "willfully" in 15 U.S.C. § 1681n as permitting an award of statutory and punitive damages whenever an appellate court concludes in hindsight that the defendant's position on an issue of first impression was "implausible," even if it was informed by legal advice about this complex statute.

As we now show, immediate correction of that idiosyncratic and erroneous ruling is vitally important. First, as

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[5] MICA respectfully reserves its members' rights to argue, at an appropriate time and in an appropriate context or forum, the application of the Ninth Circuit's opinion to a particular set of facts.

we show in Part I, the Ninth Circuit's decision will impact a wide swath of the economy, extending far beyond the circumstances of the individual cases before the Court. Although these cases primarily involve the adverse action notice requirements in the context of automobile insurance, the decision below will affect compliance with all of FCRA's substantive provisions by a broad array of industries. Second, as we show in Part II, the Ninth Circuit's ruling will immediately cause serious problems across the wide sweep of its impact. It will increase litigation and promote forum shopping in class actions against companies with multistate operations, like MICA's members; it will unduly pressure companies using consumer information in all of those nationwide operations, thus raising costs and effectively nullifying the contrary decisions of the other Circuit courts that have correctly interpreted the law; and it will inappropriately undermine the attorney-client privilege. These effects will be particularly pronounced because FCRA is a complex statute with numerous unresolved issues, each of which will be directly affected by the Ninth Circuit's ruling that "implausible" answers to unresolved issues can merit an award of punitive damages. Finally, these many adverse effects will be particularly problematic because, as Congress determined in enacting FCRA, the efficient flow of consumer information and the balancing of consumer and industry interests is of vital importance to the American economy.

I. THE DECISION BELOW WILL HAVE IMPACTS FAR BEYOND THE PARTICULAR CIRCUMSTANCES OF THESE CASES, INCLUDING ON THE MORTGAGE INSURANCE INDUSTRY

The cases before the Court primarily involve an alleged failure to comply with FCRA's adverse action notice requirement in the context of automobile insurance sales. But the Ninth Circuit's eccentric and wrongheaded articu-

lation of the standard for what constitutes a "willful" violation of FCRA will, absent correction, both affect numerous other industries, including mortgage insurance, and impact compliance with all of the Act's requirements, not only the giving of adverse action notices in the context of the use under certain circumstances of credit scores.

A. FCRA Affects Much of the Economy

FCRA affects a wide array of businesses. It imposes obligations not only on consumer reporting agencies (15 U.S.C. §§ 1681b, 1681v), but also on companies that furnish information to consumer reporting agencies (*id.* § 1681s-2) and, in certain circumstances, on users of information contained in consumer reports (*id.* § 1681m). Thus, although petitioners in these cases primarily are personal lines automobile insurers, the Ninth Circuit's interpretation of FCRA will impact many other segments of the economy. Indeed, as a general matter, retailers, employers, and government agencies each use consumer information for various purposes.[6]

The same is true throughout the housing industry. First, insurance companies that write homeowner's insurance policies frequently use the homeowner's credit scores in determining the premiums for such insurance.[7] Second, most companies that make mortgage loans use the homeowners' credit information in underwriting the risks of mortgage loans and determining the interest rates and other terms for those loans.[8] Finally, credit information may also be used in connection with the private mortgage insurance issued by MICA's members. Mortgage insurance policies are issued to

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[6] S. Rep. No. 103-209, at 1–2 (1993).

[7] See, *e.g.*, S. Rep. No. 108-166, at 7 (2003).

[8] *Id.*; see also U.S. Gen. Accounting Office, GAO Report No. 06-435, Mortgage Financing: HUD Could Realize Additional Benefits from its Mortgage Scorecard 5 (Apr. 2006) (discussing use of automated underwriting of loans using borrower credit scores).

mortgage lenders to protect them against the risk of payment defaults by the homeowners. The premium charged to the lender by the mortgage insurer is based on a variety of factors, including, in certain types of mortgage insurance policies, information contained in the homeowners' consumer reports. Indeed, as cited above, MICA's members are defendants in putative class actions alleging that they use consumer information and have disclosure duties under 15 U.S.C. § 1681m.

B. The Ninth Circuit's Willfulness Ruling Is Likely To Have an Impact on all of the Act's Substantive Provisions

FCRA imposes a variety of substantive duties beyond the adverse action notice provisions that the Ninth Circuit considered. For example, section 1681b sets forth permissible purposes for which consumer reporting agencies may furnish, and third parties may receive, consumer report information. 15 U.S.C. § 1681b. Sections 1681c, 1681g, and 1681i impose requirements with respect to the types of information that a consumer reporting agency may include in a consumer report, how consumer reporting agencies must disclose such information to consumers, and how disputes over accuracy are resolved by such agencies and by information furnishers. *Id.* §§ 1681c, 1681g & 1681i. Section 1681m imposes duties on users of information in consumer reports in certain circumstances. *Id.* § 1681m. And section 1681s-2(b) provides procedures for investigations by entities that furnish consumer information into certain disputes over the accuracy of consumer information. *Id.* § 1681s-2(b).

Moreover, the Act's provisions are not limited to the use of credit information, which was at issue in these cases. The duties under FCRA arise from use of information in consumer report[s], a term that Congress defined to include not only credit information, but also "any information * * * bear-

ing on a consumer's * * * character, general reputation, personal characteristics, or mode of living." *Id.* § 1681a(d)(1). That definition has been construed to include such data as driving record information,[9] social security numbers, and even nicknames.[10]

With some exceptions where private suits are barred (*e.g.*, *id.* § 1681s-2(c)), FCRA authorizes an award of statutory and punitive damages against "[a]ny person who willfully fails to comply with *any* requirement imposed under this subchapter." *Id.* § 1681n(a) (emphasis added). Thus, the Ninth Circuit's interpretation of the word "willfully" may affect compliance with, and lawsuits involving, a large number of FCRA's requirements. There are, for example, dozens of lawsuits now pending in which plaintiffs are seeking punitive damages on the ground that creditors and insurers did not make firm offers of credit or insurance when they sent out so-called "prescreened" solicitations to consumers, and thus allegedly violated FCRA restrictions on obtaining consumer information for such purposes under section 1681b.[11]

In short, the Ninth Circuit's redefinition of the term "willfully" in section 1681n will affect a vast array of entities and all of FCRA's numerous requirements, and hence amply justifies review by the Court.

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[9] See FTC Staff Letter from William Haynes to Matthew B. Halpern (June 11, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/halpern.htm.

[10] See *Yang v. GEICO*, 146 F.3d 1320 (11th Cir. 1998).

[11] See, *e.g.*, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006); *Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053 (N.D. Cal. 2006); *Pearson v. Novastar Home Mortgage, Inc.*, No. 05-1377-A, 2006 U.S. Dist. LEXIS 36282 (M.D. La. Mar. 28, 2006).

II. THE NINTH CIRCUIT'S DIVERGENT AND ERRONEOUS DECISION WILL CAUSE PROBLEMS ACROSS THE BROAD SWEEP OF ITS IMPACT

The Ninth Circuit's decision will not just sweep broadly; it will cut deep. It will, with respect to the Act's unresolved issues, promote forum shopping, skew and complicate compliance, and undermine the attorney-client privilege. Those impacts will be particularly pronounced because FCRA is, in fact, a complicated statute that presents many unresolved issues. And this pronounced effect is especially problematic because, as Congress found, the flow of consumer information is critical to the American economy, including the housing market—which is why the Act strikes a balance between business and consumer interests that the Ninth Circuit's ruling threatens to upset.

A. The Circuit Split Created by the Ninth Circuit Will Result in Forum Shopping and More Litigation, Skew Compliance, and Undermine the Attorney-Client Privilege

As noted above, mortgage insurers provide insurance on millions of mortgages nationwide. Absent prompt correction, the Ninth Circuit's acknowledged refusal to adopt the interpretation of FCRA reached by other Circuits will lead to extensive forum shopping and increased class action filings and will adversely affect efforts to comply with the statute.

The decision below threatens to make district courts in the Ninth Circuit the forums of choice for FCRA nationwide class actions. The ability to pursue claims for statutory and punitive damages dramatically increases the potential damages under FCRA; indeed, unlike other federal statutes such as the Truth in Lending Act and the Fair Debt Collection Practices Act, FCRA does not cap a defendant's liability in class actions. As such, the ruling below, by creating a lessened standard of proof for "willful" violations, will di-

rectly drive the calculus as to where plaintiffs will file suit. Because mortgage insurers carry out their activities on a nationwide basis, plaintiffs will have the opportunity to try to file their FCRA class action cases in the Ninth Circuit, thus avoiding the other circuit court decisions that apply a sensible reading of the key statutory term. Indeed, starting immediately after the Ninth Circuit's initial opinion, numerous FCRA class actions have been filed in the Ninth Circuit—including by residents of far-off jurisdictions such as Georgia and Tennessee.[12] Allowing the conflict created by the decision below to persist thus would give a green light to massive forum shopping. Moreover, by lowering the standard for statutory and punitive damages, the decision below likely will lead to a sharp increase in filing of new FCRA class actions, thereby raising costs and increasing artificial settlement pressures.

The ruling below will also skew the efforts of mortgage insurers to comply with FCRA, raising costs and discouraging the beneficial use of consumer information. As Congress has emphasized, FCRA "seeks to balance the needs of consumers and businesses" with respect to the use of consumer information. S. Rep. No. 103-209, at 2 (1993).[13]

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[12] See *Luther v. 1-800-BAR-NONE*, No. 05 c 4026 (N.D. Cal. Oct. 5, 2005); *Hogan v. PMI Mortgage Ins. Corp.*, No. C05-3851 PJH (N.D. Cal. Sept. 23, 2005); *Holloway v. Homefield Fin. Inc.*, No. SACV 05-0861 (C.D. Cal. Sept. 6, 2005); *Phillips v. Accredited Home Lenders Holding Co.*, No. SACV 05-851 (C.D. Cal. Sept. 1, 2005); *Yeagley v. Wells Fargo & Co.*, No. C05-3403 CRB (N.D. Cal. Aug. 22, 2005); *Putkowski v. Irwin Home Equity Corp.*, No. C05-3289 PJH (N.D. Cal. Aug. 12, 2005).

[13] See also *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045–46 (7th Cir. 2005) (FCRA is an "attempt to achieve this balance between consumer privacy and the needs of a modern, credit-driven economy"); *Ladner v. Equifax Credit Info. Servs., Inc.*, 828 F. Supp. 427, 429 (S.D. Miss. 1993) (FCRA "legislat[es] a balance between the interest of the consumer public and that of financial institutions").

Given the severity of a potential class-action award of statutory and punitive damages if a company's position on an unresolved issue is determined in hindsight to have been "implausible," mortgage insurers, like other companies, will be pressured by the ruling to consider adopting an unnecessarily conservative reading of each of the Act's various requirements. Indeed, the Ninth Circuit's ruling will impose particular burdens on companies with nationwide or multistate operations, like MICA's members, because of the risk from nationwide class actions filed in the Ninth Circuit. It will be cold comfort to such businesses that other Circuits have held that statutory and punitive damages can be awarded only for knowing noncompliance with the Act's requirements. The fact that the Ninth Circuit's decision not only conflicts with, but as a practical matter will *nullify*, the rulings of other appellate courts underscores the urgent need for review by this Court.

Finally, the ruling below will undermine the attorney-client privilege and, in doing so, will weaken rather than enhance compliance with the Act's substantive requirements. As the Ninth Circuit unabashedly acknowledged, its "reckless disregard" standard will routinely put at issue "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." 435 F.3d at 1099. Indeed, given the risk of catastrophic statutory and punitive damages in nationwide class action cases, mortgage insurers and other defendants may, as a practical matter, feel it necessary to disclose the privileged advice they received in an effort to defend themselves. As such, the Ninth Circuit's approach contravenes the strong public interest in protecting attorney-client communications. See, *e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Moreover, by putting such advice routinely at issue, the ruling below will discourage clients from seeking, and lawyers from providing, frank and thoughtful advice with respect to FCRA compliance—lest such advice later be used against the

client as proof of the kind of "creative lawyering" that, under the Ninth Circuit's approach, justifies the imposition of exemplary damages on a defendant. Thus, rather than motivating companies to "seek objective answers from their counsel as to the true meaning of the statute" (435 F.3d at 1099), the decision below will undermine forthright legal advice and true compliance with the Act. Last, still further problems will arise from the Ninth Circuit's assertion (*id.*) that consultation with attorneys and reliance on their advice may not be sufficient to avoid a finding of willfulness if a court concludes in hindsight that the lawyers provided "indefensible answers." That holding places clients in the impossible situation of having to second-guess their attorneys—still further undermining both the privilege and compliance. It can safely be said that Congress never intended such an approach when it enacted section 1681n.

B. These Adverse Effects Will Be Particularly Pronounced Because FCRA Is a Complex Statute that Raises many Unresolved Issues

The Ninth Circuit's holding that a defendant can be held to have acted "willfully" if an appellate court finds its position on an unresolved FCRA issue be "implausible" will have a particularly powerful impact because FCRA is a complicated statute as to which industry has been given little regulatory guidance and which raises many still-unresolved issues.

FCRA is a "complex statutory scheme." *Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003). For example, as directly applicable to these cases, the term "adverse action" is given five separate meanings by the Act. 15 U.S.C. § 1681a(k). There is, moreover, relatively little guidance as to the proper interpretation or application of the Act's complicated provisions. The FTC, which has jurisdiction over certain of the Act's provisions, has no general authority to issue substantive rules under the Act (see 15 U.S.C.

§ 1681s(a)(1); 65 Fed. Reg. 80,802, 80,803 (Dec. 22, 2000)) and, since 2001, has not even issued informal interpretive letters (see http://www.ftc.gov/os/statutes/fcrajump.htm). Indeed, three years ago, Congress enacted the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, a lengthy statute that revised many of FCRA's existing provisions and added numerous new statutory terms, but many of the regulations that Congress required for implementing these new provisions have yet to be issued.

Not surprisingly, given the Act's complexity and limited guidance, numerous issues concerning the Act's interpretation and application remain unresolved. In the instant cases, for example, the Ninth Circuit considered, admittedly as a "matter of first impression," whether an initial insurance premium charge is properly considered an "increase in any charge" and hence can constitute an "adverse action." 435 F.3d at 1090. In ruling that it is, moreover, the court rejected multiple prior district court rulings, including in the case on appeal.[14] The Ninth Circuit also considered, again for the first time, whether an "adverse action" can have occurred when the use of credit information resulted in the consumer receiving a better rate than if credit information has not been considered at all. On this new issue, too, the appeals court rejected the district court's ruling. 435 F.3d at 1092–93.

Similarly, issues relating specifically to the Act's application to mortgage insurance remain unresolved under FCRA. For example, the duties that apply in the event of an "adverse action" depend in part on which of the five prongs of the Act's "adverse action" definition applies. 15 U.S.C. § 1681a(k). Mortgage insurance arises as part of a credit transaction: when a prospective homeowner seeks credit in the form of a mortgage, the lender as part of that credit transaction obtains mortgage insurance in order to insure against

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[14] See, *e.g.*, *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003).

the risk it would face if the borrower defaults on a loan and the value of the collateral is insufficient to pay the amount of the outstanding indebtedness. Because mortgage insurance, thus, is an integral part of a transaction in which a consumer is obtaining credit, MICA believes that the so-called "credit" prong applies. *Id.* § 1681a(k)(1)(A). Advocates in cases against MICA's members have argued, however, that the definition of adverse action applicable to the "underwriting of insurance" instead applies. *Id.* § 1681a(k)(1)(B)(i). This unresolved question is crucial; if the credit transaction definition applies, a mortgage insurer is not required to send adverse action notices in circumstances where the consumer obtains the product (a loan) that he or she sought. See 16 C.F.R. pt. 698, app. H, § I.C ("No adverse action occurs in a credit transaction where the creditor makes a counteroffer that is accepted by the consumer.").

Another area of uncertainty concerns whether adverse action notice requirements even apply to mortgage insurers. A federal district court has ruled that mortgage insurers have no duty to send adverse action notices to consumers because mortgage insurers contract with lenders, not consumers, and because they insure lenders' risks, not consumers' risks. *Whitfield v. Radian Guar., Inc.*, 395 F. Supp. 2d 234 (E.D. Pa. 2005), *appeal pending*, No. 05-5017 (3d Cir.). An older, non-binding FTC staff letter disagrees. FTC Staff Letter from Clarke W. Brinckerhoff to Paul H. Schieber at n.1 (Mar. 3, 1998), *available at* http://www.ftc.gov/os/statutes/fcra/schieber.htm.

In short, the Ninth Circuit's adoption of a standard that invites an award of massive statutory and punitive damages for wrong answers to open FCRA issues is particularly pernicious because there are so many open issues under the Act. Immediate correction of that standard is therefore all the more important.

C. These Pronounced Adverse Effects Are Especially Problematic Because the Efficient Flow of Consumer Information Is Vital to the Economy, Including the Housing Industry

The recent widespread advances in technology have dramatically affected the consumer reporting industry.[15] Because of the computerization of records, development of the internet, and ability to transmit data electronically, entities that maintain information about consumer accounts now are able to quickly provide reporting agencies with considerable amounts of information, and entities whose operations are enhanced through the use of consumer information now are able to access it on a timely basis.[16]

This flow of consumer information is vital to the United States economy. In passing FCRA, Congress found that our "banking system is dependent upon fair and accurate credit reporting." 15 U.S.C. § 1681(a)(1). It further found that consumer reporting agencies "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." *Id.* § 1681(a)(3). Indeed, this Court has found that "Congress enacted the FCRA in 1970 to," *inter alia*, "promote efficiency in the Nation's banking system * * *." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

FCRA facilitates and encourages the efficient flow of consumer information in multiple ways. Congress authorized disclosure by consumer reporting agencies of consumer

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[15] S. Rep. No. 104-185, at 18 (1995) ("the credit reporting industry has grown in the wake of information technology advances that have occurred over the last twenty years").

[16] Robert B. Avery et al., An Overview of Consumer Data and Credit Reporting, Federal Reserve Bulletin, at 49 (Feb. 2003), *available at* http://www.federalreserve.gov/pubs/bulletin/2003/0203lead.pdf (estimating that each consumer reporting agency receives more than two billion items of information each month).

information to various public and private entities in numerous circumstances. 15 U.S.C. § 1681b. It directed companies that maintain information about consumer accounts to furnish such information to consumer reporting agencies in an accurate manner. *Id.* § 1681s-2. Congress also preempted state laws that interfere with FCRA's key provisions. *Id.* § 1681t(b).

The nationwide system created by Congress provides considerable benefits to business and consumers alike. The FTC has noted that "[t]his flow of information [permitted under FCRA] enables credit grantors and others to make more expeditious and accurate decisions, to the benefit of consumers."[17] Among the benefits conferred by the efficient sharing of consumer information are rapid qualification for mortgage, automobile, and retail credit; higher levels of home ownership; more accurate pricing of credit based on risk; and increased availability of non-mortgage credit for low-income households.[18] According to Congress, these benefits have saved consumers as much as $100 billion annually.[19]

In sum, by establishing a standard for punitive damages that will adversely effect the efficient flow of consumer information on a nationwide basis, the Ninth Circuit's ruling undermines Congress's goal of promoting the efficient flow of such information in order to enhance the economy, including the promotion of homeownership. As shown above, FCRA seeks to balance consumer and business interests in the use of consumer information, and the Ninth Circuit's

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[17] Federal Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, at 1 (Dec. 2004), *available at* http://www.ftc.gov/reports/facta/041209factrpt.pdf.

[18] H.R. Rep. No. 108-263, at 23 (2003).

[19] *Id.*

opinion threatens to upend that careful balance. The petitions for review should therefore be granted.

III. THE NINTH CIRCUIT'S ERRONEOUS "ADVERSE ACTION" RULINGS FURTHER WARRANT REVIEW

The need for review is even greater in light of the Ninth Circuit's erroneous reading of the Act's critical adverse action provisions, which will exacerbate the problems described above. First, the Ninth Circuit's conjured requirement that an adverse action notice must "describe the action" taken, "specify the effect of the action upon the consumer," and "identify the party or parties taking the action" (435 F.3d at 1095) is not just unsupported by the statutory text, it will also cause serious practical problems. In the mortgage insurance context, the *lender* decides whether mortgage insurance is needed, the amount of the insurance, whether and to what extent the borrower will be asked to pay the premium, and, in some instances, the rate at which the policy will be issued. Describing the action taken, and the effect on the consumer, in these circumstances could require a complex recitation about the nature of mortgage insurance, the relationship between the lender and the mortgage insurer, and the various mortgage insurance plans that MICA's members offer to mortgage lenders, in order to comply with the Ninth Circuit's new, vague directive. Separately, confusion will likely result if a consumer who has successfully obtained a mortgage loan is simultaneously told that he or she experienced "adverse" action and receives that notice from an entity (the mortgage insurer) with whom he or she has had no dealings of any kind.

Likewise, the Ninth Circuit's holding that adverse action occurs under section 1681m when "because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged" (435 F.3d at 1092) misconstrues the Act's plain language. If there was no

earlier charge, there simply cannot be said to have been "an increase in any charge" (15 U.S.C. § 1681a(k)(1)(B)(i)), and hence there is no adverse action. Likewise, where no credit information has been found, the subsequent pricing decision simply cannot be said to have been "based in whole or in part on any information contained in a consumer report" (*id.* § 1681m(a)), and hence no duties are triggered.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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August 21, 2006

Nos. 06-82, 06-84, 06-100, 06-101

FILED
AUG 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY,
Petitioner,

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,
Petitioners,

GEICO GENERAL INSURANCE COMPANY, *et al.*,
Petitioners,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

JASON JAY REYNOLDS,
Respondent,

CHARLES BURR, *et al.*,
Respondents,

AJENE EDO,
Respondent,

JULIE WILLES,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Property Casualty Insurers Association of America ("PCI") respectfully submits this *amicus curiae* brief in support of the petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit filed by Hartford Fire Insurance Company; GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company; Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon; and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively "petitioners").[1]

INTEREST OF *AMICUS CURIAE*

PCI is a trade group dedicated to representing its member companies' interests before governmental bodies and state and federal courts. PCI's members include more than 1,000 property and casualty insurance companies that together account for $184 billion in direct written premiums, including 52% of all personal auto premiums and 39.6% of all homeowners premiums written in the United States.

PCI is familiar with the issues involved in this case, including the issues raised in petitioners' petitions for writs of certiorari. As those petitions demonstrate, this case presents several issues of first impression relating to the interpretation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, each of which is of critical importance to PCI's members and to the insurance industry as a whole. PCI and its member companies thus have a substantial interest in the outcome of the present action.

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1. No counsel for any party authored this *amicus* brief in whole or in part, and no person or entity other than PCI made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this *amicus* brief, and their letters are on file with the Clerk of this Court.

In PCI's view, one aspect of the Ninth Circuit's opinion in particular bears further briefing: the required contents of a valid adverse action notice under 15 U.S.C. § 1681m. PCI believes its *amicus* brief will be helpful to the Court in offering a somewhat different approach to this issue than do the parties' petitions and in providing data that underscore the significant negative consequences to the insurance industry and the insurance-buying public if the Ninth Circuit's opinion is allowed to stand.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion fashions entirely new content requirements for adverse action notices that threaten the very solvency of the insurance industry. These unprecedented requirements are unsupported by any authority and conflict with both the express language of 15 U.S.C. § 1681m ("section 1681m") and with Federal Trade Commission directives written for the express purpose of advising insurers of their obligations under FCRA. These new notice requirements are vague in their scope and application and, given the realities of modern insurance underwriting practices, may be virtually impossible for insurers to meet.

The detailed notice requirements adopted by the Ninth Circuit will also thwart one of Congress's primary objectives in enacting FCRA, which is to provide consumers with clear, intelligible information concerning their credit reports. Combined with the court's expansive definition of "willfulness," imposition of these requirements threatens the insurance industry with potentially ruinous penalties and the prospect of continued litigation. For all these reasons, petitioners' requested writs of certiorari should issue.

ARGUMENT

A. The Decision Below Seriously Threatens the Continued Availability and Affordability of Personal Lines Insurance.

According to the Ninth Circuit's opinion, in order to comply with section 1681m, an adverse action notice must, "at a minimum, . . . communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action." *Reynolds v. Harford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1095 (9th Cir. 2006); *see id.* at 1100. As will be discussed further below, these hitherto unknown requirements conflict with the express language of the statute, run afoul of the dictates of prior case law, and are patently inconsistent with Federal Trade Commission advisory directives written specifically to inform insurers of their obligations under FCRA. If upheld, these requirements could have a potentially devastating impact on the insurance industry, since insurers have for years sent out notices that could be construed to fall short of the Ninth Circuit's newly-minted requirements. In light of the broad standard of "willfulness" adopted by the court (discussed further below), such a construction could subject many insurers to statutory liabilities of staggering proportions.

According to industry data, it is estimated that, in 2005, the number of personal lines policies subject to credit scoring (including both new business and renewals) exceeded 71.5 million.[2] While there are no data stating how many adverse

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2. This figure was derived using public information, beginning with the latest personal auto and homeowners exposure counts from the National Association of Insurance Commissioners for those states

(Cont'd)

action notices insurers sent during this same time period, it may conservatively be assumed that approximately 50% of these policies triggered such notices.[3] Based on these assumptions, insurers sent some 35.7 million adverse action

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(Cont'd)

where credit information is allowed. Because each insured automobile constitutes an "exposure," even though more than one auto may be insured on a single policy, the total number of "exposures" was extrapolated and converted into policy counts using data from the Federal Highway Administration and the U.S. Census Bureau. The total policy counts (176.4 million) were then reduced to include only those policies for which credit history was examined. The factors used to generate the final numbers and their sources are as follows:

- Proportion of companies known to use insurance scoring - Michigan Office of Financial and Insurance Services;
- Percentage of the largest auto companies using credit scoring models - Conning & Company;
- Percentage of companies using credit data on new business - Conning & Company;
- Retention ratios (applied to develop breakdown between new business and policy renewals) - Ward Financial Group; and
- Frequency with which renewal policy counts are subject to credit (three years) - National Conference of Insurance Legislators' Model Act Regarding Use of Credit Information in Personal Insurance

These percentages and ratios were then applied to the total policy counts to determine the estimated new and renewal policies affected by the use of credit-based insurance scoring.

3. These percentages obscure the fact that, generally speaking, the use of credit information and other consumer reports enables carriers to charge *lower* rates overall than would otherwise be the case. Thus, a carrier's actions in an individual case might trigger an adverse action notice (e.g., where the applicant's credit standing results in an "increased" premium), even though the applicant is paying less than if the carrier had calculated the premium using a different set of factors that did not include credit information.

notices in 2005 alone, *not* including those sent when an application is denied. Assuming, as it is reasonable to do, that similar numbers of adverse action notices were sent in each of the past five years, carriers have sent approximately 178.5 million adverse action notices since 2001 – many of which could conceivably be vulnerable to *ex post facto* scrutiny based on the Ninth Circuit's new notice requirements.

FCRA provides for statutory damages of between $100 and $1000 per willful violation. 15 U.S.C. § 1681n(a). The Ninth Circuit's overreaching interpretation of FCRA's notice requirements thus potentially exposes the insurance industry to statutory damages alone (not including punitive damages) that could threaten the solvency of many insurers and negatively affect the continued availability and affordability of personal lines insurance. Even without more, but especially in light of these potentially devastating consequences, the Ninth Circuit's erroneous and unsupported interpretation of FCRA's notice requirements warrants this Court's plenary review.

B. The "Minimum Requirements" for a Valid Adverse Action Notice Announced by the Ninth Circuit Are Not Supported by the Statutory Language and Are Inconsistent with the Governing Agency's Interpretation of the Statute.

1. The Ninth Circuit's Interpretation of Section 1681m Conflicts with the Statutory Language and Has No Support in the Case Law.

The purposes of FCRA, and of its notice requirement, are twofold: "to safeguard against the improper reporting of information on a credit report (either by the credit reporting agency or by the furnisher of credit information)" and to guard against "the improper disclosure of a credit report."

Myers v. Bennett Law Offices, 238 F.3d 1068, 1074 (9th Cir. 2001); *see* 15 U.S.C. § 1681(b) (noting that one of FCRA's purposes is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information").

In aid of this goal, section 1681m of the Act sets forth requirements for users of consumer reports, and provides that any person who takes adverse action based in whole or in part on information contained in a "consumer report"[4] shall provide three specific types of information to the consumer, in "oral, written, or electronic" form: (1) notice of the adverse action; (2) contact information for the consumer reporting agency (together with a statement that the agency did not make the decision to take the adverse action and cannot provide information concerning the action); and (3) notice of the consumer's right to obtain a copy of the consumer report and to dispute the accuracy or completeness of any information in the report.[5] 15 U.S.C. § 1681m.

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4. The Act broadly defines "consumer report" as any communication by a consumer reporting agency "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used . . . as a factor in determining the consumer's eligibility for," among other things, "insurance . . . to be used primarily for personal, family, or household purposes[.]" 15 U.S.C. § 1681a(d)(1).

5. Section 1681m(a) provides:

> If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall–

(Cont'd)

In considering whether the adverse action notices at issue here met these requirements, the Ninth Circuit went well beyond the mandate of the statute. Rather, as noted above, the court concluded that a valid notice must, "at a minimum," specifically state that an adverse action was taken; "describe" the action; "specify the effect" of the action on the consumer; and identify the party or parties taking the action. *Reynolds*,

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(Cont'd)

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically–

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right–

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

435 F.3d 1095; *see id.* at 1100. None of these content requirements is found in section 1681m itself, and none can fairly be implied from the language of the statute.

In support of its holding, the Ninth Circuit cited only *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir. 1983), a case that has virtually nothing to do with the issues involved here. In that case, Fischl applied for credit to finance the bulk of the purchase price of an automobile. The credit application was referred to General Motors Acceptance Corp. ("GMAC"), which obtained a consumer report on Fischl. After reviewing the application and consumer report, GMAC determined that credit should not be extended. It then sent Fischl a form letter advising him that his application had been rejected on the ground that "credit references are insufficient." In the portion of the letter designed to disclose the use of information from outside sources, GMAC marked "disclosure inapplicable." *Id.* at 145. Fischl subsequently learned that GMAC had in fact obtained his credit information and filed suit under FCRA.

Not surprisingly, the Fifth Circuit held that GMAC's purported notice failed to comply with section 1681m, since it misleadingly stated "disclosure inapplicable" instead of informing Fischl that GMAC had in fact relied on a consumer report in denying Fischl's loan application. *Id.* at 150. But that is all the *Fischl* opinion says: Other than to make plain that an adverse action notice cannot contain untrue information, the case does not even address the required content of such a notice – much less hold that such a notice is invalid unless it contains the specific and detailed information required by the Ninth Circuit. Indeed, other than the Ninth Circuit here, no court in the country has ever interpreted section 1681m to impose any such requirements.

2. The Ninth Circuit's Interpretation of Section 1681m Conflicts with That of the Federal Trade Commission, the Agency Charged with Enforcing FCRA.

In accord with both the express statutory language and common sense, the Federal Trade Commission – the agency primarily responsible for enforcing the FCRA (*see* 15 U.S.C. § 1681s(a); *Fischl*, 708 F.2d at 149 n.4) – has specifically addressed what information an insurer must provide a consumer in an adverse action notice. In stark contrast to the Ninth Circuit's interpretation, both the FTC's regulations and its advisory materials essentially track the express language of the statute and state that, to be effective, an insurer's adverse action notice need only include "the name, address, and telephone number" of the agency supplying the report; "a statement that the credit reporting agency that supplied the report did not make the decision to take its adverse action"; and a notice of the consumer's right to dispute the information.[6] *See* 16 C.F.R. Part 601, App. C.; "FTC Facts

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6. In *Fischl*, the Fifth Circuit summarized the FTC's role in interpreting FCRA as follows:

> Although it does not possess substantive rule-making power, the FTC is authorized to enforce the FCRA, "except to the extent that enforcement . . . is specifically committed to some other government agency under [§ 1681s(b)]. . . ." §15 U.S.C. 1681s(a). . . . Due to the absence of express statutory authority to issue binding interpretations of the FCRA, which effectively deprives any such interpretation of the force of law, opinions disseminated by the FTC, whether in the form of its compliance manual or unofficial staff letters, are intended only to clarify the FCRA and are advisory in nature. *These opinions may nonetheless offer helpful guidance to the courts.*

708 F.2d at 149 n.4 (emphasis added).

for Business: Consumer Reports – What Insurers Need to Know" (FTC October 1998) (reproduced at PCI's Appendix ("PCI App.") at App. B); *see also* FTC Staff Opinion Letter, dated November 10, 1998, PCI App. at App. A (opining that section 615(a) of FCRA requires adverse action notices to contain "only the information specified" in the statute).

Prior to the decision below, no court had ever suggested, much less held, that an adverse action notice must contain the detailed content required by the Ninth Circuit. Nor can such a requirement be gleaned from a fair reading of the FCRA itself. To the contrary, the only source of specific information concerning the "official" interpretation of this aspect of FCRA – the FTC's regulations and the advisory materials written specifically for insurers – detail a much simpler and straightforward response to consumers in the event of adverse action. A writ of certiorari should therefore issue to review and correct the Ninth Circuit's unjustified and erroneous interpretation of section 1681m's notice requirements.

C. The Ninth Circuit's Notice Requirements Do Not Further FCRA's Purposes and Impose an Unreasonable Administrative and Economic Burden on Insurers.

As noted above, the primary goal of section 1681m is "to promote the accuracy of information in a consumer credit report." *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1334 (9th Cir. 1995). The Ninth Circuit's newly imposed "minimum" requirements are of no assistance whatever in achieving that end. To the contrary, and in contrast to the statutory requirements, the Ninth Circuit's requirements will serve only to impose an enormous operational burden on insurers without providing consumers with any additional information necessary to determine if their credit information is accurate and, if not, how to correct it. Take, for example, the Ninth Circuit's requirement that

the notice "specify the effect of the [adverse] action upon the consumer." *Reynolds*, 435 F.3d at 1095. First, this requirement is impermissibly vague in scope and application, since it is impossible to determine what the phrase "specify the effect" means or what level of detail is necessary to satisfy this criterion.[7] Moreover, assuming an insurer could overcome this threshold hurdle, the complexities of modern insurance underwriting are such that many insurers will simply be unable to provide the information apparently required by the Ninth Circuit – or at least to do so in a form that consumers will understand.

To be sure, some insurers may use credit information in such a straightforward way that the "effect" of the adverse action will be easy to discern and explain – such as when an insured's premium rate is increased solely and directly because of information in his or her credit report. More often, however, the role of consumer reports in the rating process is much more complicated and nuanced, having both direct and indirect ramifications. Insurance companies calculate premiums using various underwriting or rating factors. These factors can be affected in numerous ways by information contained in consumer reports. For example, many insurers use consumer report information to calculate an "insurance score," which is then used to place an applicant in a basic risk category or "tier," such as "preferred," "standard," or "nonstandard." Each of these tiers may have associated rating factors and may also, in turn, determine what other rating parameters are applied. Thus, for example, the fact of a speeding violation (information which itself comes from a consumer report) may affect the "preferred" risk tier differently than the "nonstandard" risk tier. Similarly, an applicant's insurance score may affect whether an applicant

7. Thus, far from providing guidance as to FCRA compliance, the Ninth Circuit's notice requirements threaten to open a Pandora's box of new litigation.

is eligible for certain discounts or surcharges and, if so, the amount of those discounts and surcharges.

This interaction among the various factors that go into the setting of premiums could make it literally impossible for an insurer to "specify the effect" of the "action" taken as a result of information derived from an individual policyholder's consumer reports. The problem is further complicated by the fact that insurers may use information from a number of consumer reports (e.g., credit reports, motor vehicle reports, and others) in setting a premium or determining eligibility for coverage, making any meaningful explanation of the "effect" of the reports virtually impossible. Suppose, for example, a policyholder has "good" credit (as derived from a credit report) and one speeding violation. Through sophisticated statistical techniques, an insurer might be able to derive the *overall* rate impact of these two factors combined, but not be able to separate the impact of the good credit, on the one hand, and the speeding violation, on the other. Just how is the carrier to "specify the effect" of its action in these circumstances?

The end result is that, to satisfy the Ninth Circuit's notice requirements, insurers may be forced to provide consumers with an extremely complicated description of their underwriting practices, corporate structure and business practices. Thus, far from providing clear, intelligible information designed to assist a consumer in determining whether his or her credit information is accurate and to correct it if it is not, the result of the Ninth Circuit's opinion is to impose upon insurers the duty to provide highly complex and detailed disclosures in which the key information contemplated by the statute will be all but lost.

D. The Ninth Circuit's Conclusions on Notice and Willfulness Are Inconsistent with FCRA's Intent and Threaten to Subject the Insurance Industry to Potentially Crippling Penalties.

Violations of FCRA (including the failure to comply with the adverse action notice requirements of section 1681m(a)) subject the users of consumer reports to a variety of civil damages and penalties. "Negligent noncompliance" subjects a user to liability for actual damages sustained by the consumer as a result of the noncompliance, plus court costs and attorney fees in the event of successful litigation. 15 U.S.C. § 1681o(a). If the noncompliance is "willful," the user is additionally liable for statutory damages of between $100 and $1,000 per consumer, as well as for punitive damages. *Id.* § 1681n(a).

As explained by the parties in their petitions, the Ninth Circuit's adoption of a "reckless disregard" standard of willfulness blurs the distinction between negligent and willful conduct and is therefore contrary to this Court's prior holdings.[8] Even were that not so clearly the case, other circuits have concluded – correctly – that the level of culpability required to constitute "willfulness" under FCRA is much higher, reserving its application to situations in which the defendant *knew* the challenged conduct to be unlawful. *See Phillips v. Grendahl*, 312 F.3d 357, 368, 370 (8th Cir. 2002) (noting that "the statute's use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful" and that "willful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law"); *Duncan*

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8. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 129-30 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988), both of which hold that mere negligence does not equal willfulness.

v. Handmaker, 149 F.3d 424, 429 (6th Cir. 1998) ("[I]n order to incur civil liability for operating under false pretenses, a party must act willfully and purposefully 'with a motivation to injure.' [Citation.] This interpretation comports with the language of § 1681n. . . ."). Indeed, the Ninth Circuit specifically acknowledged this split of authority, but opted to follow the "reckless disregard" standard adopted by the Third Circuit in *Cushman v. Trans Union Corp.*, 115 F.3d 220, 229 (3d Cir. 1997).[9] *Reynolds*, 435 F.3d at 1098. On the basis of this conflict alone, the Court should grant the petitions for certiorari.

Beyond this, however, the effect of the Ninth Circuit's erroneous interpretation of the term "willfully" itself warrants review by this Court. If the Ninth Circuit's "reckless disregard" standard were to be applied to all aspects of FCRA compliance, including the content of adverse action notices, major segments of the insurance industry could be subjected to potentially staggering statutory and punitive damages resulting from the routine – and long-approved – use of consumer reports. Given the significant numbers of adverse action notices sent each year, the potential financial penalties are staggering. The alternative is that insurers may be dissuaded from using consumer reports altogether, which would increase the cost of insurance to consumers.

These potential results are far removed from Congress's intent in enacting FCRA, which specifically authorizes the use of consumer reports in the underwriting of insurance. *See* 15 U.S.C. § 1681b. At the same time, the effect of the Ninth Circuit's notice requirements is to seriously disrupt the ability of insurers to do business and, in the final analysis,

9. Although declining to adopt an "actual knowledge" standard, the *Cushman* court was at least careful to point out that, to be actionable as a "willful" violation, the defendant's conduct "must be on the same order as willful concealments or misrepresentations." 115 F.3d at 227. The Ninth Circuit has not similarly qualified its holding.

to harm the very consumers that FCRA was enacted to protect. On this ground as well, this Court should grant the petitions for certiorari to review the Ninth Circuit's ill-considered opinion.

CONCLUSION

For all the reasons discussed above and in the parties' petitions, a writ of certiorari should issue to review the opinion and judgment of the Ninth Circuit below.

Respectfully submitted,

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APPENDIX

APPENDIX A — FTC STAFF OPINION LETTER, DATED NOVEMBER 10, 1998

Federal Trade Commission (F.T.C.)
Division of Financial Practices

Fair Credit Reporting Act

Staff Opinion Letter

November 10, 1998

Mr. Ronald L. Sheffield

Special Assistant Commissioner, Consumer Affairs

Arkansas Insurance Department

1200 West Third Street

Little Rock, AR 72201-1904

Dear Mr. Sheffield:

This will respond to your letter inquiring about the applicability of the Fair Credit Reporting Act ("FCRA") to an insurance company's denial of insurance to an applicant based on information contained in a consumer report. You ask two specific questions: (1) does the FCRA require an insurance company to disclose to an applicant what specific information in the credit report was relied on in denying insurance to that applicant; (2) if not, would the insurance company violate the FCRA by voluntarily disclosing such information to the applicant. The answer is "no" to both questions.

Section 615(a) of the FCRA sets forth the information that must be disclosed to a consumer by any person taking adverse

action[1] with respect to that consumer based in whole or in part on any information contained in a consumer report. That section requires disclosure of only the information specified, namely:

1. Notice (either oral, written, or electronic) of the adverse action;

2. The name, address, and telephone number of the consumer reporting agency ("CRA") from whom the report was obtained. If the CRA compiles and maintains files on consumers on a nationwide basis, the person must disclose a toll-free number for the CRA, which the CRA is required to establish;

3. A statement that the CRA did not make the decision to take the adverse action and is unable to provide the specific reasons why the action was taken; and

4. Notice of the consumer's right to obtain a free copy of his or her consumer report from the CRA and to dispute the accuracy or completeness of any information in a consumer report furnished by the CRA.

The FCRA does not require insurers to disclose specific reason(s) for taking adverse action, or to identify information from a consumer report that contributed to the action. Instead, it provides the consumer with the right to obtain a copy of all the information in his or her CRA files. From the required notice (item #4, above), consumers who suffer adverse action will know of their right to obtain that data without charge. However, should

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1. With respect to the underwriting of insurance, Section 603(k)(1)(B)(i) of the FCRA defines "adverse action" to mean "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

an insurer or other person wish to tell a consumer the reason(s) for the adverse action, nothing in the FCRA precludes that person from doing so.[2]

This is an informal staff opinion and is not binding on the Commission.

Sincerely,

Ronald G. Isaac

Attorney

2. Section 607(c) forbids CRAs from prohibiting insurers or other consumer report users from providing consumers against whom they have taken adverse action with copies of their reports.

APPENDIX B — "FTC FACTS FOR BUSINESS: CONSUMER REPORTS – WHAT INSURERS NEED TO KNOW" (FTC OCTOBER 1998)

As an insurer, you may use consumer reports to underwrite insurance policies and to screen high-risk applicants — as long as you comply with the Fair Credit Reporting Act (FCRA).

The Act

The FCRA is designed to protect the privacy of consumer report information and to guarantee that the information supplied by credit reporting agencies (CRAs) is as accurate as possible. Consumer reports may include information on an applicant's credit history, medical conditions, driving record, criminal activity, and hazardous sports. Amendments to the FCRA, which went into effect September 30, 1997, increase the legal obligations of insurers who use consumer reports.

5a

Appendix B

Non-compliance with the FCRA

There are legal consequences for insurers who fail to get an applicant's permission before requesting a consumer report or who fail to provide required disclosure notices. The FCRA allows individuals to sue insurers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue insurers for non-compliance and obtain civil penalties.

For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft, and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

Appendix B

The Adverse Action Notice

The following disclosure requirement applies to new applicants as well as current policy holders. When an adverse action is taken—such as a decision to deny insurance, increase rates, or terminate a policy—and it is based solely or partly on information in a consumer report, Section 615(a) of the FCRA requires you to provide a notice of the adverse action to the consumer. The notice must include:

- ✓ the name, address, and telephone number of the CRA that supplied the consumer report, including the toll-free telephone number for credit bureaus that maintain files nationwide;
- ✓ a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give the specific reasons for it; and
- ✓ a notice of the individual's right to dispute the accuracy or completeness of any information the CRA furnished, and the consumer's right to a free report from the CRA upon request within 60 days.

Disclosure of this information is important because some consumer reports may contain errors. The adverse action notice is required even if information in the consumer report was not the main reason for the denial or rate increase. Even if the information in the report played only a small part in the overall decision, the applicant still must be notified.

While written adverse action notices are not required, many insurers provide them and keep copies for two years to show compliance with the FCRA.

Examples

The following examples illustrate situations where the adverse action notice must be given to insurance applicants.

A life insurance company orders a consumer report from a CRA, such as the Medical Information Bureau (MIB). Information contained in the MIB report leads to further investigation of the applicant. The application for insurance is rated or declined in whole or in part because of information obtained from the investigation.

Section 604(g) of the FCRA requires an insurance company, or any other user of medical information, to get the consumer's consent — orally, electronically, or in writing — before obtaining medical information. That means the life insurance company in this situation would have to get the consumer's consent before obtaining the consumer report from the MIB. In addition, since the MIB report formed part of the basis for the adverse decision in this case, the full Section 615(a) adverse action notice described above must be sent to the consumer.

A person with an unfavorable credit history, such as a bankruptcy, is denied automobile insurance at standard rates. Although the credit history was considered in the decision, the applicant's limited driving experience was even more important.

The applicant is entitled to the Section 615(a) adverse action notice because the credit report played a part, however minor, in the insurer's decision to charge a higher premium.

Supreme Court, U.S.
FILED
NOV 1 3 2006
OFFICE OF THE CLERK

No. 06-84

IN THE
Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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NOTICE

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Amended Opinion and Order of the United States District Court for the District of Oregon, *Spano, et al. v. SAFECO Ins. Co. of Am.*, No. CV 01-1464-BR (Mar. 3, 2004) 3a

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 01-1464-BR

LORI SPANO, ET AL.,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF OREGON, ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
10/2/01	1	Complaint *Demand for Jury Trial* Filing Fee collected. Receipt #: 439987 issued Summons issued as to Safeco Corporation. Filed by Lori Spano against Safeco Corporation. (jlr,) (Entered: 10/03/2001)
		* * * * *
11/13/01	10	Answer to Complaint *Defenses and Affirmative Defenses* (Related Doc # 1). Filed by Safeco Corporation. (ljb,) (Entered: 11/14/2001)
		* * * * *
12/21/01	13	Motion for Leave *to File a First Amended Complaint, Oral Argument Requested.* Filed by Lori Spano. (ljb,) (Entered: 12/27/2001)
12/21/01	14	Memorandum in Support of *Plaintiff's Motion for Leave to File a First Amended Complaint.* Filed by Lori

		Spano. (Related document(s)13) (ljb,) (Entered: 12/27/2001)
1/2/02	17	Protective Order by Stipulation: Signed 1/2/02 by Judge Anna J. Brown. (ljb,) (Entered: 01/07/2002)
		* * * * *
1/3/02	16	Memorandum in Opposition *to Plaintiff's Motion for Leave to File First Amended Complaint.* Filed by Safeco Corporation. (Related motion(s)13) (sm,) (Entered: 01/03/2002)
1/8/02	18	**CIVIL MINUTES:** Record of Proceeding (Rule 16 Conference) – ORDER: All pending Deadlines are STRICKEN. Further Status Conference set for 4/1/2002 at 10:00AM. Joint Status Report due 3/25/2002. Plaintiff's Motion (#13) to file Amended Complaint is GRANTED and to be filed by 1/14/2002. Ordered by Judge Anna J. Brown. Counsel Present for Plaintiff: Steve Larson; Steve Berman. Counsel Present for Defendant: John Bennett. Court Reporter: Dennis Apodaca. (sm,) (Entered: 01/09/2002)
1/9/02	19	First Amended Complaint. Filed by Alan Opoien, Lori Spano against Safeco Corporation. (ljb,) (Entered: 01/11/2002)
1/24/02	20	Answer *Defenses and Affirmative Defenses to First amended Complaint.* Filed by Safeco Corporation. (Related document(s)19) (ljb,) (Entered: 01/25/2002)
		* * * * *

6/4/02	34	Motion for Leave *to File a Second Amended Complaint.* Filed by all plaintiffs. (ljl,) (Entered: 06/07/2002)
6/4/02	35	Memorandum in Support *of Plaintiffs' Motion for Leave to File a Second Amended Complaint.* Filed by all plaintiffs. (Related document(s)34) (ljl,) (Entered: 06/07/2002)

* * * * *

6/7/02	37	Stipulated Dismissal of Plaintiff Alan Opoien. ORDERED, ADJUDGED AND DECREED that plaintiff Alan Opoien is dismissed from this case. Signed 6/6/02 by Judge Anna J. Brown. (ljl,) (Entered: 06/10/2002)

* * * * *

6/18/02	41	Memorandum in Opposition *to Plaintiff's Motion for Leave to File a Second Amended Complaint.* Filed by Safeco Corporation. (Related motion(s)34) (ljl,) (Entered: 06/20/2002)
7/1/02	42	Reply to Motion *for Leave to File a Second Amended Complaint.* FILED UNDER SEAL. Filed by Lori Spano. (Related motion(s)34) (ljl,) (Entered: 07/02/2002)
7/1/02	43	Affidavit of *Steve D. Larson in Support of Plaintiff's Reply.* FILED UNDER SEAL. Filed by Lori Spano. (Related document(s)42) (ljl,) (Entered: 07/02/2002)

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7/9/02	45	**CIVIL MINUTES:** Record of Order – The Court has completed its consideration of Plaintiff's Motion for Leave to

		File a Second Amended Complaint (#46) and Defendant Safeco's Opposition. Consistent with the Court's resolution of similar motions in the other FCRA cases assigned to this Court, and in the exercise of discretion, the Court GRANTS Plaintiff's Motion. Plaintiff shall file the Second Amended Complaint no later than 7/19/2002. Ordered by Judge Anna J. Brown. (sm,) (Entered: 07/09/2002)
7/10/02	46	Second Amended Complaint *for Violation of the Fair Credit Reporting Act.* Filed by Lori Spano against Safeco Insurance Company of America. (ljl,) (Entered: 07/11/2002)

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7/22/02	48	**CIVIL MINUTES:** Record of Proceedings (Status Conference) – ORDER: Plaintiffs' ORAL request to add additional plaintiff/putative class representative is ALLOWED. Third Amended Complaint to be filed by 7/24/2002; Defendant's Answer to be filed by 8/7/2002. Other pending dates confirmed. Ordered by Judge Anna J. Brown. Counsel Present for Plaintiff: Steve Larson; Steve Berman. Counsel Present for Defendant: John Bennett. Court Reporter: Nancy Walker. (sm,) (Entered: 07/22/2002)
7/23/02	49	Third Amended Complaint *for Violation of the Fair Credit Reporting Act.* Filed by Patricia McGrath, Charles Burr, Joan Horton, Shannon Massey, Lori Spano against Safeco Insurance Company of America. (ljl,) (Entered: 07/24/2002)

8/8/02	50	Stipulation of Dismissal of Safeco Corporation as a Defendant and Change of Caption. by Judge Anna J. Brown. Signed 8/6/02 (ljl,) (Entered: 08/09/2002)
8/8/02	51	Answer, *Defenses and Affirmative Defenses to Plaintiffs' Third Amended Complaint for Violation of the Fair Credit Reporting Act.* Filed by Safeco Insurance Company of America. (Related document(s)49) (ljl,) (Entered: 08/09/2002)
9/23/02	52	Stipulated Notice of Dismissal of Party Joan Horton and Patricia McGrath. Filed by all plaintiffs. (sm,) (Entered: 09/24/2002)

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11/22/02	76	Motion for Summary Judgment. Filed by Safeco Insurance Company of America. (ljl,) (Entered: 11/26/2002)
11/22/02	77	Memorandum in Support *of Motion for Summary Judgment. Oral Argument Requested.* Filed by Safeco Insurance Company of America. (Related document(s)76) (ljl,) (Entered: 11/26/2002)
11/22/02	78	Concise Statement of Material Fact. Filed by Safeco Insurance Company of America. (ljl,) (Entered: 11/26/2002)

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11/27/02	84	Amended Memorandum in Support *of its Motion for Summary Judgment. Oral Argument Requested.* Filed by Safeco Insurance Company of America. (Related document(s)76) (ljl,) (Entered: 12/03/2002)

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12/30/02	87	Response *to Defendant's Concise Statement of Material Facts in Support of Defendant's Motion for Summary Judgment. FILED UNDER SEAL.* Filed by all plaintiffs. (Related document(s)78) (ljl,) (Entered: 01/02/2003)
12/30/02	88	Memorandum in Opposition *to Motion for Summary Judgment. FILED UNDER SEAL.* Filed by all plaintiffs. (Related motion(s)76) (ljl,) (Entered: 01/02/2003)
12/30/02	89	Affidavit of *Birney Birnbaum in Support of Opposition to Defendant's Motion for Summary Judgment. FILED UNDER SEAL.* Filed by Charles Burr, Shannon Massey, Lori Spano. (Related document(s)88) (ljl,) (Entered: 01/02/2003)
12/30/02	90	Affidavit of *Mark A. Friel in Support of Opposition to Motion for Summary Judgment. FILED UNDER SEAL.* Filed by Charles Burr, Shannon Massey, Lori Spano. (Related document(s)88) (ljl,) (Entered: 01/02/2003)
		* * * * *
1/3/03	92	Affidavit of *Birny Birnbaum (with original Signature Page). FILED UNDER SEAL.* Filed by all plaintiffs. (Related document(s)89) (ljl,) (Entered: 01/03/2003)
		* * * * *
1/10/03	94	Motion to Supplement *the Concise Statement of Material Facts.* Filed by Safeco Insurance Company of America. (ljl,) (Entered: 01/13/2003)
1/10/03	95	Memorandum in Support *of Motion to Supplement the Concise Statement*

		of Material Facts. Filed by Safeco Insurance Company of America. (Related document(s)94) (ljl,) (Entered: 01/13/2003)
1/10/03	96	Affidavit of *John A. Bennett in Support of Motion to Supplement Concise Statement of Material Facts.* Filed by Safeco Insurance Company of America. (Related document(s)94) (ljl,) (Entered: 01/13/2003)
		* * * * *
1/10/03	98	Reply to Motion *for Summary Judgment.* Filed by Safeco Insurance Company of America. (Related motion(s)76) (ljl,) (Entered: 01/13/2003)
		* * * * *
1/10/03	100	Reply *to Plaintiffs' Statement of Additional Facts.* Filed by Safeco Insurance Company of America. (Related document(s)87) (ljl,) (Entered: 01/13/2003)
1/10/03	101	Affidavit of *John A. Bennett in Support of Reply to Plaintiffs' Statement of Additional Facts.* Filed by Safeco Insurance Company of America. (Related document(s)100) (ljl,) (Entered: 01/13/2003)
1/10/03	102	Supplemental Affidavit of *Robert C. Taylor in Support of Reply to Plaintiffs' Statement of Additional Facts. (not an original signature).* Filed by Safeco Insurance Company of America. (Related document(s)100) (ljl,) (Entered: 01/13/2003)
1/10/03	103	Motion to Strike *Affidavit of Birny Birnbaum.* Filed by Safeco Insurance Company of America. (Related document(s)92) (ljl,) (Entered: 01/13/2003)

1/10/03	104	Memorandum in Support *of Motion to Strike the Affidavit of Birny Birnbaum.* Filed by Safeco Insurance Company of America. (Related document(s)103) (ljl,) (Entered: 01/13/2003)

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1/14/03	107	Supplemental Affidavit of *Robert C. Taylor in Support of Reply to Plaintiffs' Statement of Additional Facts. Original signature.* Filed by Safeco Insurance Company of America. (Related document(s)100, 102) (ljl,) (Entered: 01/14/2003)
1/14/03	108	Supplemental Affidavit of *Barbara Steeves in Support of Safeco's Supplemental Concise Statement of Material Facts. (Original signature) (faxed copy is attached to affidavit of John Bennett).* Filed by Safeco Insurance Company of America. (Related document(s)96) (ljl,) (Entered: 01/14/2003)

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1/21/03	110	Memorandum in Opposition *to Defendant Safeco Insurance Co's Motion to Strike Affidavit of Birney Birnbaum. FILED UNDER SEAL.* Filed by all plaintiffs. (Related motion(s)103) (ljl,) (Entered: 01/22/2003)
1/21/03	111	Memorandum in Opposition *to Defendant Safeco's Motion to Supplement the Concise Statement of Material Facts. FILED UNDER SEAL.* Filed by all plaintiffs. (Related motion(s)94) (ljl,) (Entered: 01/22/2003)

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2/3/03	113	Reply to Motion *to Supplement the Concise Statement of Material Facts.* Filed by Safeco Insurance Company of America. (Related motion(s)94) (dls,) (Entered: 02/04/2003)

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2/3/03	115	Reply to Motion *to Strike Affidavit of Birny Birnbaum.* Filed by Safeco Insurance Company of America. (Related motion(s)103) (dls,) (Entered: 02/04/2003)

* * * * *

2/7/03	117	**CIVIL MINUTES:** Record of Order – Defendant's Motion (#94) to Supplement the Concise Statement of Material Facts is GRANTED. Defendant Supplemental Concise Statement of Material Facts by 2/10/2003; Plaintiff's supplemental response to Defendant's Supplemental Concise Statement of Material Facts and supplemental memorandum, if any, due by 2/21/2003; Defendant supplemental reply memorandum, if any, due by 2/28/2003; the Court will take Defendant's Motion for Summary Judgment (#76) and Plaintiff's Motion to Strike the Affidavit of Birny Birnbaum (#103) UNDER ADVISEMENT on 2/28/2003. (Related documents(s) 103, 76) Ordered by Judge Anna J. Brown. (sm,) (Entered: 02/07/2003)
2/10/03	118	Supplemental Concise Statement of Material Fact. Filed by Safeco Insurance Company of America. (ljl,) (Entered: 02/10/2003)

* * * * *

2/20/03	120	Response *to Defendant's Supplemental Concise Statement of Material Fact (FILED UNDER SEAL).* Filed by all plaintiffs. (Related document(s)118) (dls,) (Entered: 02/20/2003)
2/26/03	121	Reply *to Plaintiffs' Response to Defendant's Supplement Concise Statement of Material Facts in Support of Defendant's Motion for Summary Judgment.* Filed by Safeco Insurance Company of America. (Related document(s)87) (ljl,) (Entered: 02/28/2003)

* * * * *

3/4/03	123	Motion for Leave *to File a Second Amended Complaint. Oral Argument Requested.* Filed by all plaintiffs. (ljl,) (Entered: 03/05/2003)
3/4/03	124	Memorandum in Support *of Motion for Leave to File a Second Amended Complaint.* Filed by all plaintiffs. (Related document(s)123) (ljl,) (Entered: 03/05/2003)

* * * * *

3/14/03	126	Memorandum in Opposition *to Plaintiffs' Motion for Leave to File a Second Amended Complaint.* Filed by Safeco Insurance Company of America. (Related motion(s)123) (kw,) (Entered: 03/14/2003)
3/14/03	127	Affidavit of *John A. Bennett in Support of Defendant Safeco Insurance Company of America's Opposition to Plaintiffs' Motion for Leave to File a Second Amended Complaint.* Filed by Safeco Insurance Company of America.

(Related document(s)126) (kw,) (Entered: 03/14/2003)

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3/25/03 129 Reply to Motion *for Leave to File a Second Amended Complaint. FILED UNDER SEAL.* Filed by all plaintiffs. (Related motion(s)123) (ljl,) (Entered: 03/25/2003)

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4/22/03 131 **OPINION AND ORDER:** Order Granting Defendant's Motion for Summary Judgment (Related Doc #76); Order Denying as Moot Defendant's Motion to Strike the affidavit of Birny Birnbaum (Related Doc #103); Order Granting in part and Denying in part Plaintiffs' Motion for Leave to File a Second (sic) Amended Complaint (Related Doc #123). Fourth Amended Complaint due by 4/29/03. See 29 page Opinion and Order. Signed on 4/21/03 by Judge Anna J. Brown. (ljl,) (Entered: 04/22/2003)

4/24/03 132 Fourth Amended Complaint. Filed by Charles Burr, Shannon Massey, Lori Spano against American States Insurance Company, Safeco Insurance Company of Illinois, Safeco Insurance Company of Oregon. (ljl,) (Entered: 04/28/2003)

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5/12/03 140 Answer to Amended Complaint *(Fourth Amended Complaint), Defenses and Affirmative Defenses.* (Related Doc # 132). Filed by American States Insurance Company, Safeco Insurance Company of

Illinois, Safeco Insurance Company of Oregon. (ljl,) (Entered: 05/12/2003)

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5/23/03	143	Motion to Certify the Class. Filed by all plaintiffs. (Larson, Steve) (Entered: 05/23/2003)
6/6/03	144	Motion for Summary Judgment. Filed by all defendants. (ljl,) (Entered: 06/09/2003)
6/6/03	145	Concise Statement of Material Fact. Filed by all defendants. (ljl,) (Entered: 06/09/2003)
6/6/03	146	Memorandum in Support *of Motion for Summary Judgment.* Filed by all defendants. (Related document(s)144) (ljl,) (Entered: 06/09/2003)

* * * * *

6/16/03	148	**CIVIL MINUTES:** Record of Order by Judge Anna J. Brown. In light of the Court's rulings at oral argument on 5/21/2003 in the matter of Mark v. Valley Property and Casualty, CV 01-1575 BR, the issues taken under advisement in that case, and the potential effect of the rulings in that case, the Court will defer taking Defendants' Motion for Summary Judgment (#144) under advisement until after the Court's opinion has been issued in the Mark case. The Court took the pending Motion in Mark under advisement on 6/2/2003, and an opinion will be issued in due course. (sm,) (Entered: 06/16/2003)
6/20/03	149	Response *to Defendants' Concise Statement of Material Facts. FILED UNDER SEAL.* Filed by Charles Burr, Shannon

Massey, Lori Spano. (Related document(s)145) (ljl,) Modified on 6/23/2003 (ljl,). (Entered: 06/23/2003)

6/20/03 150 Memorandum in Opposition *to Defendants' Motion for Summary Judgment. FILED UNDER SEAL.* Filed by Charles Burr, Shannon Massey, Lori Spano. (Related motion(s)144) (ljl,) (Entered: 06/23/2003)

6/20/03 151 Affidavit of *Mark A. Friel in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment. FILED UNDER SEAL.* Filed by Charles Burr, Shannon Massey, Lori Spano. (Related document(s)150) (ljl,) (Entered: 06/23/2003)

* * * * *

7/7/03 153 Motion to Strike *Affidavit of Birny Birnbaum. Oral Argument Requested.* Filed by American States Insurance Company, Safeco Insurance Company of Illinois, Safeco Insurance Company of Oregon. (Related document(s)89, 92) (ljl,) (Entered: 07/09/2003)

7/7/03 154 Memorandum in Support *of Motion to Strike the Affidavit of Birny Birnbaum.* Filed by all defendants. (Related document(s)153) (ljl,) (Entered: 07/09/2003)

7/7/03 155 Reply to Motion *for Summary Judgment.* Filed by all defendants. (Related motion(s)144) (ljl,) (Entered: 07/09/2003)

7/7/03 156 Reply *to Statement of Additional Facts.* Filed by all defendants. (ljl,) (Entered: 07/09/2003)

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7/16/03	158	Memorandum in Opposition *to Defendants' Motion to Strike Affidavit of Birny Birnbaum (FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER).* Filed by Charles Burr, Shannon Massey, Lori Spano. (Related motion(s)153) (kw,) (Entered: 07/22/2003)
7/29/03	159	Reply to Motion *to Strike Affidavit of Birny Birnbaum. ORAL ARGUMENT REQUESTED.* Filed by all defendants. (Related motion(s)153) (ljl,) (Entered: 07/29/2003)

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12/19/03	165	**OPINION AND ORDER:** For the Reasons in the 17 page opinion and order, the Court Grants Defendants' Motion for Summary Judgment (Related Doc #144) on the claims of Plaintiffs Massey and Burr and DISMISSES these claims with prejudice. The Court DENIES Defendants' Motion for Summary Judgment (#144) on the claims of Plaintiff Spano. In addition, the Court GRANTS Defendants' Motion to Strike the Affidavit of Burney Birnbaum (Related Doc #153). Signed on 12/19/03 by Judge Anna J. Brown. (ljl,) (Entered: 12/22/2003)

* * * * *

1/14/04	167	Motion for entry of Rule 54(b) Judgment. Filed by all plaintiffs. (Larson, Steve) (Entered: 01/14/2004)
1/14/04	168	Memorandum in Support of Plaintiffs' Motion for Entry of Rule 54(b) Judgment. Filed by all plaintiffs. (Related document(s)167) (Larson, Steve) (Entered: 01/14/2004)

1/16/04	169	**CIVIL MINUTES:** Record of Proceedings (Rule 16 Conference) before Judge Anna J. Brown. Counsel Present for Plaintiff: Steve Larson. Counsel Present for Defendant: John Bennett. Court Reporter: Amanda LeGore. ORDER: Plaintiffs WITHDRAW the pending Motion for Class Certification (#143), and the Motion is therefore DENIED as MOOT. (sm,) (Entered: 01/16/2004)
1/26/04	170	Response to Motion *for Entry of Final Judgment, and Memorandum in Support of Defendant's Motion for Interlocutory Appeal. Oral Argument Requested.* Filed by all defendants. (Related motion(s)167) (ljl,) (Entered: 01/27/2004)
1/26/04	171	Motion *for Certification of Interlocutory Appeal.* Filed by all defendants. (ljl,) (Entered: 01/27/2004)

* * * * *

2/6/04	173	Reply to Motion *for Entry of Final Judgment Under FRCP 54(b) and Memorandum in Opposition to Defs' Motion for Certification of Interlocutory Appeal.* Filed by all plaintiffs. (Related motion(s)167) (Larson, Steve) (Entered: 02/06/2004)
2/17/04	174	Reply *Memorandum in Support of Their Motion for Interlocutory Appeal.* Filed by American States Insurance Company, Safeco Insurance Company of Illinois, Safeco Insurance Company of Oregon. (Related document(s)171) (mja,) (Entered: 02/18/2004)

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2/26/04	176	**ORDER:** Opinion and Order: For the reasons stated, the Court GRANTS Plaintiffs' Motion for Rule 54(b) Entry of Final Judgment against Plaintiffs Massey and Burr (#167) and DENIES Defendants' Motion for Certification of Interlocutory Appeal (#171). (See 11 page Opinion) Signed on 2/26/2004 by Judge Anna J. Brown. (sm,) (Entered: 02/26/2004)

* * * * *

3/3/04	178	Amended Opinion and Order GRANTING Defendants' Motion for Summary Judgment (#144) on the claims of Plaintiffs Massey and Burr, and DENYING the Motion on the claims of Plaintiff Spano; GRANTING Defendants' Motion to Strike(#153) the Affidavit of Birny Birnbaum. (see original Opinion #165) Signed on 3/3/2004 by Judge Anna J. Brown. (sm,) Additional attachment(s) added on 3/8/2004 (sm,). (Entered: 03/03/2004)
3/5/04	179	Stipulation *to Stay Proceedings Pending Appeal* by all plaintiffs. Filed by all plaintiffs. (Larson, Steve) (Entered: 03/05/2004)
3/5/04	180	Motion for Judgment *FRCP 54(B) Judgment.* Filed by all plaintiffs. (Larson, Steve) (Entered: 03/05/2004)
3/8/04	181	FRCP 54(B) Judgment. All plaintiffs' claims against Safeco-America, Massey's claims against Safeco-Illinois, and Burr's claims against American States and Safeco-Oregon, are DISMISSED with prejudice. Signed on 3/8/03 by

		Judge Anna J. Brown. (ljl,) (Entered: 03/10/2004)
3/10/04	182	Order. The Stipulation to Stay Proceedings Pending Appeal is APPROVED. This action is STAYED. Ordered by Judge Anna J. Brown. (sm,) (Entered: 03/10/2004)
3/31/04	183	Notice of Appeal with attached Representation Statement and Statement Of Related Cases To USCA – 9th Circuit from judgment entered 3/10/04. Filing fee in amount of $255.00 collected; Receipt No. 175562 issued. Filed by plaintiff-appellants Shannon Massey and Charles Burr. (Related Document(s): Judgment, 181) (tomg,) (Entered: 04/01/2004)
		* * * * *
4/1/04		Notification of Appeal mailed to USCA – 9th Circuit and to counsel along with copy of docket sheet. CADS mailed to Court of Appeals. (Related Document(s): Notice of Appeal, 183) (tomg,) (Entered: 04/01/2004)
		* * * * *
4/21/04	186	Order from USCA – 9th Circuit re assignment of appeal number CA 04-35313 for appeal filed 3/31/04, and briefing schedule. (Related Document(s): Notice of Appeal, 183) (tomg,) (Entered: 05/30/2004)
		* * * * *
6/3/04	188	Certificate of Record transmitted to USCA – 9th Circuit, re appeal CA 04-35313 filed by Shannon Massey on 3/31/04. (Related Document(s): Notice

of Appeal, 183) (tomg,) (Entered: 06/03/2004)

* * * * *

5/4/06	194	MANDATE of USCA for the 9th Circuit re Notice of Appeal, Case Number 04-35313, 183. The decision of the District Court is REVERSED and REMANDED. (Related Document(s): Notice of Appeal, 183) (ecp,) (Entered: 05/05/2006)
5/5/06	195	Scheduling Order by Anna J. Brown. The Court has received the Mandate from the Ninth Circuit Court of Appeals in this matter. The Court directs the parties to confer regarding a case management plan and to submit no later than 5/19/2006 a jointly proposed plan for future handling of this matter, including a proposed schedule for any remaining dispositive motion practice and for trial. The Court will conduct a Rule 16 Conference on 5/31/2006 at 9:30AM to adopt a case management plan. (sm,) (Entered: 05/05/2006)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35313

LORI SPANO, ET AL.,
Plaintiffs,

AND

CHARLES BURR, ET AL.,
Plaintiffs-Appellants,

v.

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Defendants-Appellees.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
4/15/04	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): no. setting schedule as follows: appellant's designation of RT is due 4/12/04; appellee's designation of RT is due 4/20/04; appellant shall order transcript by 4/30/04; court reporter shall file transcript in DC by 6/1/04; certificate of record shall be filed by 6/7/04; appellant's opening brief is due 7/19/04; appellees' brief is due 8/16/04; appellants' reply brief is due 8/30/04; [04-35313] (dg) [04-35313]
	* * * * *
8/4/04	Filed Filed Under Seal original & 15 copies Appellant Charles Burr, Shannon Massey's

opening brief (Informal: n) 45 pages & 5 Excs in 2 Vols.; served on 8/2/04 [04-35313] (gva) [04-35313]

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8/6/04 Filed original & 15 copies Federal Trade Commission's amicus curiae brief of 28 pages; in support of aplts; served on 8/5/04 [04-35313] (gva) [04-35313]

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10/8/04 Filed original & 15 copies appellee Safeco Ins. Co. Amer, American States Ins., Safeco Insurance Co, Safeco Ins Co of OR's 58 pages brief, 5 Supplemental Excs.; served on 10/1/04 [04-35313] (gva) [04-35313]

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11/8/04 Filed original and 15 copies appellants Charles Burr, Shannon Massey reply brief, (Informal: No) 29 pages; 1 vol. of Supp EOR; served on 11/5/04 [04-35313] (ru) [04-35313]

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2/23/05 Filed order (Deputy Clerk: hh) Plft's and defs jt mtn for a procedural order regarding oral arg is granted. This cts ntc of hearing of 1/21/05 and its order of 2/17/04 are modified as follows: The first argument of the date shall concern the following common question: Whether an insurance company takes adverse action within the meaning of 15USC1681(d)(1) due to an increase in any charge for insurance when it charges a consumer a higher initial premium for insurance that it would have otherwise charged based, at least in part, on a consumer report. Each side is allocated 30 minutes to

address this question. The FTC's req to appear before the ct at oral arg is granted. Plfts csl and the FTC shall divide their time btwn themselves and may reserve a portion of their 30 minutes for rebuttal. Defs will select one atty to argue for their side. Any time not used will be waived. Following argument on the common issue, each of the five cases will be argued individually with the arg for cases Ashby v. Farmers Group and Ashby v. Farmers Ins. Co. of Oregon remaining consolidated. Each side will be allocated 10 minutes and the pltfs may reserve a portion of their 10 minutes for rebuttal in each case. [03-35673, 03-35695, 03-35848, 04-35279, 04-35313, 04-35394] (crw) [03-35673 03-35695 03-35848 04-35279 04-35313 04-35394]

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3/8/05 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Marsha S. BERZON, Jay S. BYBEE [03-35695, 03-35848, 04-35279, 04-35313] (dr) [03-35695 03-35848 04-35279 04-35313]

8/4/05 FILED MEMORANDUM DISPOSITION: REVERSED AND REMANDED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Unsigned, Unpublished. Stephen R. REINHARDT, Marsha S. BERZON, Jay S. BYBEE). FILED AND ENTERED JUDGMENT. [04-35313] (gva) [04-35313]

* * * * *

9/1/05 [5551439] Filed original & 50 copies Aples' petition for panel rehearing and petition for rehearing en banc of 20 pages [4171 words];

served on 8/31/05. (PANEL AND ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [04-35313] (gva) [04-35313]

10/13/05 Filed Aples' motion for leave to file amended petition for rehearing and rehearing en banc; served on 10/12/05 (PANEL) [5595593] (gva) [04-35313]

10/18/05 Filed order (Stephen R. REINHARDT, Marsha S. BERZON, Jay S. BYBEE): Aples Safeco Ins. Co. of America, American States Ins. Co. Safeco Ins. Co of Illinois and Safeco Ins. Co of Oregon's motion for leave to file an amended petition for rehearing and rehearing en banc is granted. The amended petition shall be filed 14 days of the date of this order. (phoned/faxed) [5595593-1] [04-35313] (gva) [04-35313]

11/1/05 [5615732] Filed original and 50 copies Aples' petition for panel rehearing and petition for rehearing en banc of 20 pages [4,195 words]; served on 10/31/05 (PANEL AND ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [04-35313] (gva) [04-35313]

1/25/06 Filed order (Stephen R. REINHARDT, Marsha S. BERZON, Jay S. BYBEE): In light of the new opinion filed in Reynolds v. Hartford fin. Serv. Group, Inc., No. 03-35695; Edo v. Geico Gen. Ins. Co., No. 04-35279, aples shall notify this Court within 14 days whether they wish to designate their previously filed petition for rehearing and rehearing en banc as their filing under FRAP 35(b) and Circuit Rule 35-1, or whether they intend to file a new or amended petition within the time period specified by the

rules. A failure timely to so notify this court shall be deemed a withdrawal of the petition. [04-35313] (gva) [04-35313]

* * * * *

2/15/06 [5724707] Filed original & 50 copies Aples' petition for panel rehearing and petition for rehearing en banc of 20 pages [4,167 words]; served on 2/14/06 (PANEL AND ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [04-35313] (gva) [04-35313]

* * * * *

3/29/06 Filed Aplts' response to Aples' second amended petition for rehearing en banc of 12 pages; served on 3/28/06 (PANEL AND ALL ACTIVE JUDGES AND ALL INTERESTED SENIOR JUDGES) [04-35313] (gva) [04-35313]

4/20/06 Filed order (Stephen R. REINHARDT, Marsha S. BERZON, Jay S. BYBEE): ... The petition for rehearing and rehearing en banc is denied. [04-35313] (gva) [04-35313]

5/2/06 MANDATE ISSUED. Costs taxed $649.40 against aple. [04-35313] (gva) [04-35313]

7/25/06 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 06-84 filed on 7/19/06. (PANEL) [04-35313] (gva) [04-35313]

10/2/06 Received notice from Supreme Court, petition for certiorari GRANTED on 9/26/06. Supreme Court No. 06-84 [The case is consolidated with No. 06 100 and a total of 1 hour is allotted for oral argument] (PANEL) (gva) [04-35313]

[Attorney Names/Addresses Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 01-1464 BR

LORI SPANO, ET AL.,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant.

PLAINTIFFS' THIRD AMENDED COMPLAINT FOR VIOLATION OF THE FAIR CREDIT REPORTING ACT

SUMMARY AND OVERVIEW

1. This is a class action on behalf of all purchasers of insurance policies from defendant and its subsidiaries and affiliates for personal lines of insurance from January 2000 to date (the "Class Period").

2. Defendant, and its subsidiaries and affiliates, sell personal lines of insurance in Oregon and in other states.

3. During the Class Period, defendant and its affiliates and subsidiaries used information contained in consumer reports when underwriting or rating policies for personal lines of insurance. Defendant has taken or participated in taking adverse actions with respect to plaintiffs and those similarly situated based on this information, but failed to provide the notification of the adverse action as required by the Fair Credit Reporting Act, 15 U.S.C. § 1681.

JURISDICTION AND VENUE

4. Jurisdiction is conferred by 15 U.S.C. § 1681. The claims asserted herein arise under 15 U.S.C. § 1681.

5. Venue is proper in this District pursuant to 15 U.S.C. § 1681. Defendant does business in this District and many of the insurance policies involved in this case were issued in this District.

BACKGROUND TO THE CLASS PERIOD

6. Based on information and belief, at least by January 2000, defendant and its affiliates and subsidiaries began using consumer credit report information to underwrite or rate insurance policies for personal lines of insurance.

FIRST CLAIM FOR RELIEF

For Violation of 15 U.S.C. § 1681

7. Plaintiffs incorporate paragraphs 1 through 6 by reference.

8. Plaintiffs, and all others similarly situated, purchased insurance policies from defendant or its subsidiaries and affiliates for personal lines of insurance during the Class Period. Defendant took an adverse action with respect to underwriting or rating the policies of plaintiffs, and all others similarly situated, based on information contained in consumer reports.

9. 15 U.S.C. § 1681(m) requires users of consumer reports to provide oral, written or electronic notice of any adverse action taken with respect to any consumer that is based in whole or in part on information obtained in a consumer report.

10. Defendant willfully failed to notify plaintiffs, and all others similarly situated, of the adverse action.

11. 15 U.S.C. § 1681(n) provides that any person who willfully fails to comply with any requirement imposed under § 1681(n) is liable to the consumer for damages of

not less than $100 and not more than $1,000. Accordingly, plaintiffs, and all those similarly situated, are entitled to recover statutory damages.

12. Plaintiffs, and all those similarly situated, are also entitled under 15 U.S.C. § 1681(n) to recover such amount of punitive damages as the court may allow.

13. 15 U.S.C. § 1681(n) provides that the cost of the action together with reasonable attorney fees as determined by the court are also recoverable by plaintiffs and all others similarly situated.

CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who purchased insurance policies from defendant and its subsidiaries and affiliates for personal lines of insurance from January 2000 to date.

15. The members of the Class are so numerous that joinder of all members is impracticable. During the Class Period, defendant and its subsidiaries and affiliates issued thousands of policies. The disposition of their claims in a class action will provide substantial benefits to the parties and the Court.

16. There is a well-defined community of interest in the questions of law and fact involved in this case. Questions of law and fact common to the members of the Class which predominate over questions which may affect individual Class members include:

a. Whether the underwriting and rating practices of defendant constitute adverse actions under the Fair Credit Reporting Act;

b. Whether 15 U.S.C. § 1681 was violated by defendant;

17. Plaintiffs' claims are typical of those of the Class because plaintiffs and the Class failed to receive notifica-

tion of the alleged adverse actions as required by the Fair Credit Reporting Act.

18. Plaintiffs will adequately protect the interests of the Class and have retained counsel who are experienced in class action securities litigation. Plaintiffs have no interests which conflict with those of the Class.

19. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

(1) Declaring this action to be a proper class action pursuant to Rule 23;

(2) Awarding plaintiffs and the members of the Class statutory damages, punitive damages, attorney fees and costs; and

(3) Awarding such other legal and equitable relief as the Court may deem just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

Dated this 23rd day of July, 2002.

STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.

By: /s/ STEVE D. LARSON

N. ROBERT STOLL, OSB No. 69165
STEVE D. LARSON, OSB No. 86354
STEVEN C. BERMAN, OSB No. 95176
Telephone: (503) 227-1600

And

CHARLES A. RINGO, OSB No. 89346
Telephone: (503) 643-7500

Attorneys for Plaintiffs

[Attorney Names/Addresses Omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 01-CV-1464-BR

LORI SPANO, ET AL.,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant.

DEFENDANT SAFECO INSURANCE COMPANY OF AMERICA'S ANSWER, DEFENSES AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' THIRD AMENDED COMPLAINT FOR VIOLATION OF THE FAIR CREDIT REPORTING ACT

For its Answer, Defendant SAFECO Insurance Company of America admits, denies and alleges as follows:

1.

Defendant denies Plaintiffs' allegations that this is a class action because there has been no certification of a class and no other basis alleged that Plaintiffs are authorized to appear on behalf of any other person. Defendant denies all remaining allegations in paragraph 1 of the Third Amended Complaint (hereinafter referred to as "Complaint").

2.

Defendant admits that it, some of its subsidiaries and some of its affiliates sell personal lines of insurance in

Oregon and/or in other states. Except as admitted, Defendant denies the remaining allegations in paragraph 2 of the Complaint.

3.

Defendant admits that it, some of its subsidiaries and some of its affiliates have used information within the scope of "consumer report" as defined in 15 U.S.C. § 1681a(d) when underwriting policies for personal lines of insurance. Except as admitted, Defendant denies the remaining allegations in paragraph 3 of the Complaint.

4.

Defendant admits that Plaintiffs are making their claims under 15 U.S.C. § 1681 and denies all remaining allegations.

5.

Defendant admits that it does business in the District of Oregon. Except as admitted, Defendant denies the remaining allegations in paragraph 5 of the Complaint.

6.

Defendant admits that in January of 2000 it and some of its affiliates and subsidiaries used information, including credit information, within the definition of "consumer report" set forth at 15 U.S.C. § 1681a(d) in underwriting personal automobile insurance in Oregon and Texas. Except as admitted, Defendant denies the remaining allegations in paragraph 6 of the Complaint.

7.

Defendant incorporates by reference its answers to paragraphs 1 through 6 set forth above.

8.

Defendant admits that Plaintiffs' Massey, Burr and McGrath, purchased insurance contracts with affiliates or subsidiaries of Defendant during the timeframe at issue.

Except as admitted, Defendant denies the remaining allegations in paragraph 8 of the Complaint.

9.

Defendant denies that Plaintiffs' attempt to paraphrase 15 U.S.C. § 1681m is accurate or complete, or that any answer is required to paragraph 9 of the Complaint. To the extent an answer is required, Defendant denies the allegations in paragraph 9.

10.

Defendant denies the allegations in paragraph 10 of the Complaint.

11.

Defendant denies that Plaintiffs' attempt to paraphrase 15 U.S.C. § 1681n is accurate or complete. Further, Defendant denies the allegations in paragraph 11 of the Complaint.

12.

Defendant denies the allegations in paragraph 12 of the Complaint.

13.

Defendant denies that Plaintiffs' attempt to paraphrase 15 U.S.C. § 1681n is accurate or complete. Further, defendant denies the allegations in paragraph 13 of the Complaint.

14.

Defendant denies all the allegations in paragraph 14 of the Complaint.

15.

Defendant denies the allegations of paragraph 15, except Defendant admits that it, its subsidiaries and its affiliates issued many insurance contracts from January

2000 to the date of Plaintiffs' Third Amended Complaint was filed.

16.

Defendant denies the allegations in paragraph 16 of the Complaint.

17.

Defendant denies the allegations in paragraph 17 of the Complaint.

18.

Defendant denies the allegations in paragraph 18 of the Complaint.

19.

Defendant denies the allegations in paragraph 19 of the Complaint.

FIRST DEFENSE

(FAILURE TO STATE A CLAIM)

1.

The Third Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

(DOCTRINE OF PRIMARY JURISDICTION)

2.

Primary jurisdiction for this matter is vested in the insurance division of the respective states at issue.

FIRST AFFIRMATIVE DEFENSE

(STATUTE OF LIMITATIONS)

3.

The claims asserted, or a portion thereof, are barred by the applicable statute of limitations.

SECOND AFFIRMATIVE DEFENSE

(REASONABLE PROCEDURES TO ASSURE COMPLIANCE)

4.

Pursuant to 15 U.S.C. § 1681m(c). reasonable procedures were in place to assure compliance with the provisions of 15 U.S.C. § 1681 *inter alia*, and therefore Defendant may not be held liable for any alleged violation of the Fair Credit Reporting Act.

WHEREFORE, having fully answered Plaintiffs' Third Amended Complaint, and having alleged affirmative defenses, Defendant prays for entry of Judgment as follows:

a. Denying any request to certify this matter as a class action;

b. Entry of Judgment dismissing Plaintiffs' Third Amended Complaint and granting Judgment in favor of Defendant; and

c. Including in the Judgment an award to Defendant of its reasonable costs and attorney fees.

Dated this 6th day of August, 2002.

BULLIVANT HOUSER BAILEY, PC

By /s/ JOHN A. BENNETT

JOHN A. BENNETT, OSB #75040

Telephone: (503) 228-6351

Attorneys for DEFENDANT
SAFECO Insurance Company of America

[Attorney Names/Addresses Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 01-1464 BR

LORI SPANO, ET AL.,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant.

AFFIDAVIT OF MARK A. FRIEL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT SAFECO INSURANCE COMPANY OF AMERICA'S MOTION FOR SUMMARY JUDGMENT

FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER

State of Oregon)
) ss.
County of Multnomah)

I, Mark A. Friel, being first duly sworn, state that:

1. I am one of the attorneys for plaintiffs. I make the following statements of my own personal knowledge.

2. Attached hereto as Exhibit 1 is a true and correct copy of Defendant's Response to Plaintiffs' Second Set of Requests for Admission to Defendant Safeco Insurance Company of America ("Second RFAs"), served by defendant, Safeco Insurance Company of America, on plaintiffs on August 8, 2002.

3. Attached hereto as Exhibit 2 is a true and correct copy of excerpted portions of the transcript of the deposition of Barbara Steeves ("Steeves"), taken by plaintiffs on December 11, 2002 ("Steeves December Depo.").

4. Attached hereto as Exhibit 3 is a document marked by counsel for plaintiffs as an exhibit during the Steeves December Depo. Exhibit 3 was identified by Steeves as "a sheet that shows [plaintiff Charles] Burr's premium with [defendant's] auto program as of October 22nd and how it changed as more information about his risk characteristics were revealed and also what his premium would have been had he had the highest possible credit score." Steeves December Depo. at 19:19-20:2.

5. Attached hereto as Exhibit 4 is a true and correct copy of excerpted portions of the transcript of the deposition of Steeves, taken by plaintiffs on May 10, 2002 ("Steeves May Depo.").

6. Attached hereto as Exhibit 5 is a true and correct copy of a letter obtained by plaintiffs from the, Oregon Department of Consumer and Business Services, dated August 22, 2000, signed, by Bob Fox ("Fox"), an analyst in defendant's State Filings Department, and addressed to the Oregon Department of Consumer and Business Services, Attention: Rates and Forms. Steeves identified Fox during her depositions in May and September 2002 as an employee of defendant who was responsible for making state insurance filings on behalf of defendant. Steeves May Depo. at 50:13-17; Steeves September Depo. at 12:18-13:1. Steeves further identified Exhibit 5 as a document she has probably seen, and confirmed the veracity of a number of statements made therein. Steeves May Depo. at 47:9-50-9.

7. Attached hereto as Exhibit 6 is a true and correct copy of excerpted portions of the transcript of the deposition of Robert Taylor ("Taylor"), taken by plaintiffs on May 10, 2002 ("Taylor Depo.").

8. Attached hereto as Exhibit 7 is a true and correct copy of an excerpted portion of a document marked by counsel for plaintiffs as an exhibit during the deposition of Taylor. Exhibit 7 was identified by Taylor as a list, taken from SAFECO Corporation's annual report, of companies within the Safeco group of companies. Taylor Depo. at 10:3-11:9.

9. Attached hereto as Exhibit 8 is a true and correct copy of a contract, between defendant and a number of other interrelated companies, entitled Intercompany Reinsurance Agreement, dated November 16, 1998, and effective as of January 1, 1998. Exhibit 8, which contains pages bates-labeled SAF000187-SAF000193, was produced by defendant to plaintiffs on August 19, 2002, in response to plaintiffs' First Set of Requests for Production of Documents to Defendant SAFECO Insurance Company of America ("First RFPs").

10. Attached hereto as Exhibit 9 is a true and correct copy of a letter obtained by plaintiffs from the Oregon Department of Consumer and Business Services, dated April 27, 2000, signed by Fox and addressed to the Oregon Department of Consumer and Business Services, Attention: Rates and Forms. Steeves identified Fox during her depositions in May and September 2002 as an employee of defendant who was responsible for making state insurance filings on behalf of defendant. Steeves May Depo. at 50:13-17; Steeves September Depo. at 12:18-13:1. Steeves further identified. Exhibit 9 as a document she has probably seen, and confirmed the veracity of certain statements made therein. Steeves May Depo. at 47:9-13; 50:10- 22.

11. Attached hereto as Exhibit 10 is a true and correct copy of excerpted portions of the transcript of the deposition of Steeves, taken by plaintiffs on September 11, 2002 ("Steeves September Depo.").

12. Attached hereto as Exhibit 11 is a true and correct copy of a contract, between defendant and ChoicePoint

Services, Inc., entitled Information Products Agreement, dated June 8, 2001. Exhibit 11, which contains pages bates-labeled SAF000098-SAF000103, was produced to plaintiffs by SAFECO Corporation on May 20, 2002, in response to plaintiffs' Third Request for Production of Documents to SAFECO Corporation.

13. Attached hereto as Exhibit 12 is a true and correct copy of a letter signed by Steve Rouse ("Rouse"), Assistant Director of SAFECO Personal Lines Insurance, to Trans Union's Insurance Division, dated June 26, 2002. Exhibit 12, bates-labeled SAF000168, was produced by defendant to plaintiffs on August 19, 2002, in response to plaintiffs' First RFPs.

14. Attached hereto as Exhibit 13 is a true and correct copy of an agreement, between defendant and Trans Union, entitled On-Line Service Agreement, signed March 13, 2000. Exhibit 12 was produced to plaintiffs by Trans Union on May 28, 2002, in response to a subpoena served by plaintiffs on Trans Union. Exhibit 13, which contains pages bates-labeled TU-S00004-TU-S00006, is signed by Rouse, and is referred to by Rouse in Exhibit 11.

15. Attached hereto as Exhibit 14 is a true and correct copy of an agreement, between defendant, Trans Union and Fair, Isaac and Company, entitled Assist On-Line Agreement, signed March 13, 2000. Exhibit 14 was produced to plaintiffs by Trans Union on May 28, 2002, in response to a subpoena served by plaintiffs on Trans Union. Exhibit 14 is signed by Rouse, and is referred to by Rouse in Exhibit 12.

16. Attached hereto as Exhibit 15 is a true and correct copy of Defendant's Response to Plaintiffs' First Set of Interrogatories to Defendant Safeco Insurance Company of America ("First ROGs"), served by defendant on plaintiffs on August 23, 2002.

17. Attached hereto as Exhibit 16 is a true and correct copy of a document, bates-labeled SAF000198-

SAF000199, produced by defendant to plaintiffs on September 5, 2002. Steeves recognized Exhibit 16 during her September deposition as a document that accurately sets forth defendant's insurance tier structures. Steeves September Depo. at 19:23-20:13.

18. Attached hereto as Exhibit 17 is a true and correct copy of excerpted portions of the transcript of the deposition of Zita Chubbuck taken by plaintiffs on December 11, 2002 ("Chubbuck Depo.").

19. Attached hereto as Exhibit 18 is a true and correct copy of excerpted portions of S. Rep. No. 103-209 (1993).

20. Attached hereto as Exhibit 19 is a true and correct copy of excerpted portions of H.R. Rep. No. 103-486 (1994).

21. Attached hereto as Exhibit 20 is a true and correct copy of 15 U.S.C. § 1681a, as amended by the Consumer Credit Reporting Reform Act of 1996.

22. Attached hereto as Exhibit 21 is a true and correct copy of 16 C.F.R. Pt. 601, App. C.

23. Attached hereto as Exhibit 22 is a true and correct copy of a document published by the Federal Trade Commission entitled "Consumer Reports: What Insurers Need to Know," dated October 1998. I downloaded Exhibit 22 in portable document format from the FTC's official website, <<http://www.ftc.gov/bcp/conline/pubs/buspubs/insurers.pdf>>, on December 27, 2002.

24. Attached hereto as Exhibit 23 is a true and correct copy of a letter opinion written on March 1, 2000 by FTC staff attorney Hannah Stires and addressed to James Ball. I downloaded Exhibit 23 from the FTC's official website, <<http://www.ftc.gov/os/statutes/fcra/ball.htm>>, on December 27, 2002.

25. Attached hereto as Exhibit 24 is a true and correct copy of Mick v. Level Propane Cases, Inc., No. 98-CV-959, Sept. 29, 1999, 1999 WL 33453772 (S.D. Ohio).

26. Attached hereto as Exhibit 25 is a true and correct copy of a document produced to plaintiffs by SAFECO Corporation on June 10, 2002. Exhibit 25, bates-labeled SAF000154, was among a set of documents recognized by Steeves during her September 2002 deposition. Steeves September Depo. at 69:4-18.

27. Attached hereto as Exhibit 26 is a true and correct [*sic*] of a letter from John A. Bennett to Steve D. Larson dated June 10, 2002, enclosing documents produced by SAFECO Corporation (including Exhibit 25) and stating that the enclosed documents "describ[e] the policies and procedures surrounding the use of credit information by the SAFECO insurance company underwriting entities." Exhibit 26 at 1.

28. Attached hereto as Exhibit 27 is a true and correct copy of a webpage I downloaded from the FTC's official website, <<http://www.ftc.gov/bcp/conline/edcams/fcra>>, on December 27, 2002. Exhibit 27 is specifically referred to by defendant in Exhibit 24.

DATED this 30th day of December, 2002.

/s/ MARK A. FRIEL
Mark A. Friel

[notary omitted]

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 01-1464 BR

LORI SPANO, SHANNON MASSEY AND CHARLES BURR,
Plaintiffs,

vs.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendants.

Confidential Deposition Upon Oral Examination Of
Barbara A. Steeves

December 11, 2002
Seattle, Washington

[Reporter and Attorney Information
and Table of Contents Omitted]

[4] BE IT REMEMBERED that on Wednesday, December 11, 2002, at 4333 Brooklyn Avenue Northeast, Seattle, Washington, at 4:25 p.m., before **CATHY M. ZAK, CCR,** Notary Public in and for the State of Washington, appeared **BARBARA A. STEEVES**, the witness herein;

WHEREUPON, the following proceedings were had, to wit:

<<<<<< >>>>>>

BARBARA A. STEEVES, having been first duly sworn by the Notary, deposed and testified as follows:

EXAMINATION

BY MR. LARSON:

Q Could you state and just spell your name for the record?

A Barb Steeves, S-T-E-E-V- -- as in Victor -- -E-S.

Q You had your deposition taken a couple times before in this case, corre t?

A Correct.

* * * * *

[15]

* * * * *

Q What variables would be used in rating then?

A It depends on how the product is designed. In a driving record, for example, we did not surcharge for driving activity in some of our tiers.

Q Who decides what factors and how they're weighted for underwriting?

A At what point?

Q At any point.

A Okay. Presently, it's the product manager.

Q Is that different than it used to be?

A We didn't have product managers in July of '01. That would have been home office underwriting.

Q And anyone else besides that prior to '01?

A Prior to '01, we did not have a matrix. We had underwriters and we had less markets. We had home office direction. And we had personal business

managers who managed the underwriters to assure the quality of their decisions.

Q And all those, the product managers and the underwriters, are all employees of Safeco?

A They're all employed by the Safeco insurance companies property and casualty.

[16]

Q And the lead company for the Safeco property and casualty companies is Safeco Insurance Company of America?

A Yes.

Q How would the type of vehicle be used as a factor in assigning a tier?

A Different vehicles have different loss experience associated with them. They also have different values, and that would come into consideration as to what we expect our loss experience to be with that vehicle.

If we didn't feel that we were getting enough premium to cover our expected losses on a Lamborghini, for example, we would choose to move them to a higher rated tier in order to get the appropriate premium or if we felt we didn't have the expertise to handle it with our rating program or our claims folks in the event of a claim, we would decline the risk entirely.

Q In October of 2002, Mr. Burr obtained insurance from Safeco, correct?

A Correct.

Q Have you looked at his underwriting records?

A Yes, I did.

* * * * *

[19]

* * * * *

Q And if Mr. Burr had a perfect credit score, what tier would he have been placed in?

A P-40.

Q That's like seven tiers higher?

A Yes.

Q And do you know what the difference in premium would have been?

A Yes. I'm going to assume you would like that. It would be 1,076.90 versus 1,749.70, which is his current rate after the full information was disclosed.

MR. LARSON: Could we mark that as Exhibit 13?

(Exhibit No. 13 marked for identification.)

Q (By Mr. Larson) I'm handing you what's been marked as Deposition Exhibit 12 (sic). Can you tell us what it is?

A This is a sheet that shows Mr. Burr's premium with our Safeco auto program as of October 22nd and how it changed as more information about his risk characteristics were revealed and also what his [20] premium would have been had he had the highest possible credit score.

Q Was Mr. Burr sent a fair credit reporting act notice because of the impact of his credit score?

A No.

Q Why not?

A There was no adverse action due to his credit score.

Q And is that because – I'm trying to find your language from before.

It's Safeco's position that it only needs to provide notice if they cancel, decline, increase premiums, or take away terms?

A Correct. We did not change the offering from his initial quote based on anything with his credit score.

We did change his premium because of unrevealed information obtained from outside vendors, motor vehicle report, and a Clue report upon which both times we did post-notify that we had used outside reports.

Q But those were not fair credit reporting act notices for credit, correct?

A They were fair credit reporting act notices for outside consumer reports, specific to the motor vehicle report and the Clue Report.

MR. BENNETT: And I'm giving you [21] some leeway. We're not going to go through the whole thing again.

Q (By Mr. Larson) Did you participate in making the decision that Safeco is not going to send FCRA notices for credit to those people it had just offered a quote?

A I believe we talked about this in prior depositions. There was an initial discussion on this back when we first started using credit. And at that time, that decision was made from our home office here.

Q Were you part of home office making the decision?

A I was in the field at that time.

Q Do you recall who in the home office made the decision?

A I believe in the last depositions where we talked about this, I don't know exact names. I would assume them to be some people who were in certain places at the time. Jeff Ogard was vice president of underwriting, potentially Bill Thomas who was the COO of our personal insurance.

Q Now you're in the home office though, correct?

A Correct.

Q And would you be involved in decisions about what fair credit reporting act notices should be sent under current law?

[22]

A Yes.

Q And have you looked at the issue again?

A I have been for the past few months with this specifically.

Q Even since this lawsuit has been filed?

A We continue to look at our processes and practices to make sure we're in compliance with the law.

Q And Safeco continues to take the position that it does not need to send an adverse action notice to a new business customer that is charged a higher premium because of their credit score if it's just the initial quote, correct?

MR. BENNETT: And I would object to the form of the question.

MR. LARSON: Could you read it back to me?

(Requested testimony read by the reporter.)

Q (By Mr. Larson) Let me rephrase that. And even since this lawsuit has been filed, Safeco continues to take the position that it does not have to send an adverse action notice to a new business customer that is charged more than the lowest possible rate available because of their credit score, correct?

[23]

A Safeco continues to take the position that we do need to post-notify when we cancel, when we increase the rate, when we decline insurance, when we decrease

the terms, and that has been a consistent posture for us.

Q Have you ever looked at any FTC opinions or FTC guidelines on their websites about when notices need to be sent?

A I have heard about FTC with some opinions. I have not gone to the website and read them.

Q Do you know if anyone at Safeco has?

MR. BENNETT: Steve, you know, we're here for a limited purpose, and, you know, she's been here twice before, and I'm not going to go into this area.

I guess on that, I'll instruct her not to answer.

MR. LARSON: Okay.

* * * * *

EXHIBIT 9

[Logo Omitted]

SAFECO PROPERTY & CASUALTY INSURANCE COMPANY

SAFECO Plaza
Seattle, WA 98185-0001

Phone: (206) 545-5000

April 27, 2000

Oregon Department of Consumer
and Business Services
Attention: Rates and Forms
350 Winter Street NE 440-5
Salem, Oregon 97310-0220

Attention: Ms. Jan Vitus, CIC

General Insurance Company of America 163-24732
Ultra Preferred Automobile
Effective Date: January 20, 2000 – New and Renewal Business
Our Letter Dated: January 13, 2000
Filing Number: PL-99-0707

Dear Ms Vitus:

This letter is in response to your March 13, 2000 request for additional information on the captioned filing. The response below follows in the order of your request.

1. *We enclose the Division Credit Report Underwriting Questionnaire. Please provide a written response to the entire questionnaire.*

   The Division Credit Report Underwriting Questionnaire is attached.

2. *Please provide a comparison chart for your response #1 in the Feb 23, 2000 letter. We would like to see specifically how the Ultra Preferred program differs from the Quality Plus preferred program. Also, please provide actuarial justification for each area of consid-*

eration (ie: financial stability; driving record; loss history).

a. An insurance score is calculated for consideration of financial stability. Choice Point is our third-party vendor. It provides the insurance score based on the *FairIsaac's* Model, and the *FairIsaac's* Model determines the thresholds. The Ultra Preferred and Quality Plus products both use the insurance score but in combination with the risk factors indicated below. No single prerequisite is given undue consideration during this process.

b. The following risk-based criteria is used in combination with the insurance score for the above captioned Ultra Preferred Auto program:

> The maximum number of violations/ accidents per household is one. The maximum loss history is one incident per household although young drivers may have no losses. The maximum number of incidents, both driving record and loss history combined, is two. This is based on the last three years of experience.

c. The following risk based criteria is used in combination with the insurance score for our Quality Plus Auto program:

> The maximum number of violations/ accidents per household is two. The maximum loss history is two incidents per household and young drivers may have up to one loss. The maximum number of incidents, both driving record and loss history combined, is two. This is based on the last three years of experience.

Please see the attached exhibit, Financial Stability Distribution — Based on FairIsaac's Model for actuarial support.

3. *Your response #2 in the Feb 23, 2000 letter talks about the 0.85 relativity factor being based upon market competition. Please be more actuarially specific.*

Please refer to the attached exhibit referenced in question #2. We arrived at the 0.85 relativity factor using this data in combination with market competition. Considering the Ultra Preferred Auto program is new, we will continue to evaluate this in the future as more credible data becomes available.

We hope this reply sufficiently addresses any concerns you may have regarding the introduction of our Ultra Preferred product and results in a favorable review of our filing. However, if you require additional information, please feel free to contact me at SAFECO's expense.

Sincerely,

/s/ BOB FOX

Bob Fox, Analyst
State Filings Department, T-14
(206) 545-6254 / FAX (206) 545-6466
robfox@safeco.com
BF/es

1. Identify your sources and the types of underwriting information (i.e.: MVR reports, credit reports, etc.) used:

   - By agents prior to quoting
     An insurance score and CLUE report are ordered as part of the quoting and application process and are used in establishing market level.
   - By agents prior to taking an application and/or binding coverage
     See above.
   - By insurer prior to issuing
     In addition to information provided by the application and agent, SAFECO may order MVR reports to verify the information provided.
   - At policy renewal
     There is no company standard of ordering these reports upon a policy renewal.

2. What criteria are used to determine if a credit report is ordered?
   An insurance score is requested on all new business, as it is a determinate of market level.

   Are the use of credit reports uniformly required for all quotations and sales? Are the results uniformly applied? Explain in detail an "no" answers.
   Yes. Insurance scores are required of all applicants.

   Do you use credit scoring for renewal underwriting? If yes, is it the same formula used for new business? Explain in detail.
   No.

3. Are credit reports used to prescreen an individual applicant (explain yes answer in detail):

   - By agents prior to quoting?
     Not to our knowledge

- By agents prior to taking application?
  Not to our knowledge
- By insurer prior to issuing?
  No
- To determine if additional reports will be ordered?
  No

4. Do you use a credit score to evaluate credit history for an applicant? If yes:
   - Who developed the scoring formula you are using?
     Fair, Isaac and Company, Inc.
   - Is the result used to determine premium, underwriting acceptance, or both? Explain.
     SAFECO uses insurance score, in combination with other rating variables, to determine market level and underwriting acceptance. SAFECO does not use credit information as the sole source for premium or underwriting decisions.
   - Is the formula available to the insurance regulator? If yes, include it. If no, please explain the elements used for the scoring purposes.
     The scoring formula is proprietary information of Fair Isaac and therefore may be available through Fair Isaac under a confidentiality agreement.
   - Is the scoring model known to any employee of your company?
     No.
   - Is the credit score for all applicants or quotes kept on file?
     SAFECO maintains insurance score information for those applicants issued a policy.
5. What training is provided to your sales force regarding the use of credit reports? Provide a copy of training plan and agents guide materials.
   SAFECO advises agents to inform a customer prior to ordering an insurance score that credit information

will be considered as part of the quoting and application process.

6. Are credit reports ever used as the sole source to make acceptability and premium decisions? If yes, explain in detail.
No.

7. Explain in detail the handling of a "no hit" or "limited history" response on a credit inquiry.
If an applicant has a "no hit" or "limited history" response, that person is eligible for our standard program and possibly our preferred program based on other underwriting and rating variables.

   Explain any situations where treatment differs from the treatment offered to your best credit scores.
See above.

   If less favorable treatment is given explain why.
An applicant with a "no hit" or "limited history" response is not eligible for our lowest priced market because our ability to predict the risk associated with that applicant has been limited.

8. What steps have you taken to ensure that you are in compliance with the Fair Credit Reporting Act?
SAFECO takes additional notice steps not required by the FCRA. SAFECO applications include notice to the applicants that consumer reports will be used in the processing of their policy and agents are being instructed to notify telephone applicants of the same. Renewal notification will disclose the use of consumer reports (i.e. MVR reports). Adversely affected insureds will receive written notices as required by the FCRA and may obtain a free copy of their report by simply requesting it from ChoicePoint consumer services.

Do all applications or requests for a quotation get written disclosure if an adverse decision, including rejection, refusal to quote, or a higher rate, is made based on a credit report?
Yes.

Are records of all adverse decisions maintained at the insurer's office?
No. Only when an application for insurance is submitted to the company are records maintained.

9. If you use credit report underwriting for multiple related insurers, would your answers differ if we treated the group as a single interest?
No.

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 01 1464 BR

LORI SPANO, SHANNON MASSEY, JOAN HORTON, CHARLES BURR AND PATRICIA MCGRATH,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant.

CONFIDENTIAL
Deposition Upon Oral Examination of
BARB STEEVES

September 11, 2002
Ten-fifteen a.m.
Safeco Plaza
Seattle, Washington

[Reporter and Attorney Information
and Table of Contents Omitted]

[3]

Barb Steeves, Being first duly sworn by the Notary, was examined and testified as follows:

EXAMINATION

BY MR. LARSON:

Q Please state and spell your name for the record.

A Barb Steeves, S-t-e-e-v-e-s.

Q Ms. Steeves, do you work for Safeco Insurance Company? Well, who do you work for?

A I work for Safeco.

(Deposition Exhibit No. 8 marked for identification.)

Q Let me hand you what's been marked as deposition Exhibit 8. That is an amended 30 (b) 6 notice of deposition where we asked Safeco Insurance Company of America to produce the person most knowledgeable about the use of credit scoring for underwriting a rating insurance by dependents and subsidiaries and complying with the Fair Credit Reporting Act. Are you the person that has been designated by the defendant to so testify?

A Yes.

* * * * *

[12]

* * * * *

Q Do you know if there was generally one new business placement guide for the whole country?

A Yes, there was one that was for the country. If there were state specific variances, then that guide would have been amended.

Q If you wanted to get a copy of that new business placement guide, how would you do it?

A I do not know. I would start asking some questions.

Q Who would you ask?

A I would ask some of our state filings people.

Q For example --

A Well, Kari Olson, I suppose.

Q Is that K-a-r-i?

A Yes.

Q Female?

A Female.

Q Is Bob Fox still doing filings?

[13]

A No, he is not.

Q Why would you ask the state filings people?

A My presumption would be that they would have possibly filed that in some state. I would also check with manual production people.

MR. LARSON: If you could mark this part of the deposition. That document we think is responsive.

MR. BENNETT: And that document we have discussed forever. That is what Safeco considers to be the heart of their business, how they underwrite and select risks and I hope we can reach something that will get you where you need to be and where we need to be because we are not going to produce it.

MR. LARSON: I understand. I just want to make sure that we know what document we are having a disagreement about.

MR. BENNETT: Okay, and I think we have done that. And I should note, and I meant to do so up front, once again we want to designate the deposition as confidential. We have a stipulated protective order.

* * * * *

[19]

* * * * *

Q So did the matrix have a column for the insurance or credit score rating?

A Yes, it had a reference to it, yes.

Q And did it have references to motor vehicle accidents?

A Yes.

Q And another reference to driving history?

A It had all the underwriting characteristics on one sheet.

Q How many underwriting characteristics?

A I wouldn't be able to tell you from memory.

Q Was it over 10?

A I don't believe so.

Q Somehow with this document you could line up the various variables and that would tell you what tier a person should be placed in?

A Correct.

(Deposition Exhibit No. 10 marked for identification.)

Q You have been handed what has been marked as Exhibit No. 10. Can you tell me what that document is?

[20]

A These are tier structures.

Q Did you prepare this document?

A No, I did not.

Q Do you know who did?

A No.

Q But it accurately sets forth the tier structures?

A Yes.

Q Have you seen it before today?

A Not in this format.

Q But looking at it now you can tell it's accurate?

A Yes.

Q Let's go first to auto in Oregon which is at the bottom of the first page of Exhibit 10. Do you see that?

A Yes.

Q If somebody had a good credit score and the other variables lined up to place them in Quality Plus auto, could that have happened in January of 2000?

MR. BENNETT: When you say good credit score, you mean good as to the designated category?

MR. LARSON: Yes.

[22]

Q The insurance score from January of 2000 until January of 2002 for auto in Oregon was only used to determine what tier you were placed in?

A It was only used for underwriting.

Q Only used for underwriting.

A Tier placement.

Q Tier placement is considered underwriting?

A Yes.

Q I think you also described that after the agent placed – looked at the matrix and placed a person in a tier, then they would put that person's information into some type of rating software, is that what you said?

A Yes.

Q What is that rating software called?

A Personal lines rating software.

Q And that personal lines rating software is what would determine the premium, is that correct?

A It would calculate the premium, yes.

Q And there is no variable in the personal ratings software for insurance score?

A No.

* * * * *

[24]

* * * * *

Q And prior to May 15 of 2000 was the nonstandard product, specialty auto?

A Yes.

Q In May of 2000 did the new business placement guide matrix change?

A Yes.

Q How did it change?

A I would have to see the documents before and after to exactly tell you that. My presumption would be that the place referring to specialty auto would not be there and a reference to InsurQuest would be.

Q Is it your recollection that after May 15 of 2000 until you stopped working in that department, anyway, as the personal region –

A Personal business manager.

Q Let me rephrase the question. From May of 2000 until January of 2002 did the agent obtain a description of the credit score as you described earlier, superior, excellent, good, fair or no market available, and then assign that insured to a tier which would include three tiers in InsurQuest?

A The agent would get a category, they would [25] look at the matrix which would determine tier. If they went to InsurQuest, the InsurQuest rating model would run the MVR, the score, the clue report and come back with a price 99 percent of the time or more

Q I want to make sure I understand the difference between specialty and InsurQuest. Was it basically the same in that the agent either assigned it to specialty or InsurQuest as a tier, or did the agent assign it to differ tiers within InsurQuest?

A No. The InsurQuest program, the system determined the tier.

Q And so that meant the rating system determined the tier, is that what you're saying?

A Actually it's a combined underwriting and rating system.

Q Now the combined underwriting and rating system for InsurQuest, did that use insurance score again in determining the tier?

A Yes.

* * * * *

[31]

* * * * *

Q I am sorry. I must have misunderstood. I thought you said that for InsurQuest after May 15 of 2000 it

was a combined rating and underwriting software that was used for InsurQuest.

A That's true, when you input the information we look at all of the underwriting variables and we determine the tier. Once we that, we build the rate and that's combined but there are two separate issues that we deal with within the software.

Q So ever since Safeco has been using insurance scores for auto across the country, it has only been used for tier placement, to your knowledge?

A To my knowledge that is correct.

Q And from January of 2000 until January of 2002 it was done by looking at a new business placement guide, correct?

A Correct.

Q And after that time the personal lines rating software did the tier determination?

[32]

A Correct.

Q Let me find out if there is one exception to that. For the InsurQuest in May of 2000 the agent would use the new business placement guide to determine whether that individual should be placed in InsurQuest, correct?

A Not necessarily. An agent may go directly to InsurQuest. An agent makes determinations every day about what the right company, what the right placement would be for someone.

Q But if the – I guess the point I was getting to, with InsurQuest the decision about tier 1, tier 2 and tier 3 was not made from the new business placement guide in May of 2000?

A Correct.

Q It was made by the personal lines rating software?

A It was made by the InsurQuest personal lines rating software, yes.

Q And that was different than the other personal lines rating software?

A True.

Q After January 17 of 2002 were those personal lines rating software still different?

A Yes.

[33]

Q How about after June 27th of 2002?

A No.

Q With respect to Oregon auto from January of 2000 to May of 2000, if an insured was placed in any tier below Ultra Preferred auto in whole or in part because of a credit score, were they provided a notice?

A What kind of notice?

Q A notice under the Fair Credit Reporting Act informing them that there had been an adverse action?

A That notice was not provided by Safeco. I don't know if they ever received one.

Q How else would they have received one?

A Through an independent agent.

MR. BENNETT: And I would state for the record an objection if the question implies that there has been an adverse action.

Q Did Safeco have any instructions or guidance for agents that you're aware of as to providing any Fair Credit Reporting Act notices?

A Yes.

Q What were those instructions?

A The same as for our company, based on how the [34] Fair Credit Reporting Act defines adverse action. If any of those situations present themselves we notify the customer that we used a consumer report and give them an avenue to deal with that information.

Q But from the company's perspective, if a person was placed in Quality Plus Auto for new business after January 20 of 2000, based in whole or in part on their credit score, did you deem that to be an adverse action?

A No.

Q And why was that?

A We deemed it to be an offer of insurance. Under the Fair Credit Reporting Act we need to provide notice if we cancel or decline and we do that. We need to provide notice if we increase a premium and we do that, and we need to provide notice if we take away some terms or do less favorable terms, and we do that. When we provide an offer of insurance, that is our offer of insurance. We have not changed anything.

Q Is there any difference between Ultra Preferred Auto and Quality Plus Auto other than the premium you pay?

[35]

A No.

Q No difference?

A No.

Q Same coverages?

A Same policy form, yes.

Q It is just issued by a different entity?

A Not necessarily.

Q What's the difference between the Ultra Preferred Auto and Quality Plus Auto in January of 2000?

A It would be the tier relativity.

Q What is tier relativity?

A It as the price for that tier.

Q And that tier might have been sold by a variety of companies?

A That tier is typically filed in one company. That company may also be the same company other tiers are filed in. It just depends on the state and the time and how we're set up at that time.

Q Are there any differences in having a policy issued by one company versus another within Safeco?

A Yes, there are. That's why we structure it that way.

[36]

Q What are the differences?

A It would depend on the state. I believe in my last deposition, I covered some areas where we may use different legal entities for different reasons. They may include how we work with the Department of Insurance and confidentiality protections, how the laws in the state read.

Q Will it make a difference to the consumer as to how much they pay for insurance or what benefits they receive?

A We see a difference from how we build the program because there is a difference to our business model. There is typically an impact to the customer in some way, shape or form.

Q Depending on which entity issues the policy?

A Yes.

Q Going back to May of 2000 for auto, if an agent applied for insurance for an insured with InsurQuest, without looking at the new business placement guide, and placed the information in the InsurQuest personal ratings software, would the agent know what impact the credit score made in assigning the tier for that individual?

[69]

* * * * *

(Deposition Exhibit No. 11 marked for identification.)

Q You have been handed what has been marked as Exhibit No. 11 which are documents that were produced to us by your attorney. Do you recognize those documents?

A Yes.

Q Can you tell me what they are?

A It's an underwriting question and answer piece on scoring, and also definition of terms.

Q And when you say an underwriting piece, who is the intended audience for this piece?

A I didn't draft it and I don't know exactly what the author's intent was. My impression would be underwriting service, anyone who needs to have an understanding of what we're doing and why.

* * * * *

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EXHIBIT 22

FTC FACTS for Business

Consumer Reports

What Insurers Need to Know

As an insurer, you may use consumer reports to underwrite insurance policies and to screen high-risk applicants — as long as you comply with the Fair Credit Reporting Act (FCRA).

The Act

The FCRA is designed to protect the privacy of consumer report information and to guarantee that the information supplied by credit reporting agencies (CRAs) is as accurate as possible. Consumer reports may include information on an applicant's credit history, medical conditions, driving record, criminal activity, and hazardous sports. Amendments to the FCRA, which went into effect September 30, 1997, increase the legal obligations of insurers who use consumer reports.

The Adverse Action Notice

The following disclosure requirement applies to new applicants as well as current policy holders. When an adverse action is taken—such as a decision to deny insurance, increase rates, or terminate a policy—and it is based solely or partly on information in a consumer report, Section 615(a) of the FCRA requires you to provide a notice of the adverse action to the consumer. The notice must include:

- √ the name, address, and telephone number of the CRA that supplied the consumer report, including the toll-free telephone number for credit bureaus that maintain files nationwide;
- √ a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give the specific reasons for it; and
- √ a notice of the individual's right to dispute the accuracy or completeness of any information the CRA furnished, and the consumer's right to a free report from the CRA upon request within 60 days.

Disclosure of this information is important because some consumer reports may contain errors. The adverse action notice is required even if information in the consumer report was not the main reason for the denial or rate increase. Even if the information in the report played only a small part in the overall decision, the applicant still must be notified.

While written adverse action notices are not required, many insurers provide them and keep copies for two years to show compliance with the FCRA.

Examples

The following examples illustrate situations where the adverse action notice must be given to insurance applicants.

> *A life insurance company orders a consumer report from a CRA, such as the Medical Information Bureau (MIB). Information contained in the MIB report leads to further investigation of the applicant. The application for insurance is rated or declined in whole or in part because of information obtained from the investigation.*

Section 604(g) of the FCRA requires an insurance company, or any other user of medical information, to get the

consumer's consent — orally, electronically, or in writing — before obtaining medical information. That means the life insurance company in this situation would have to get the consumer's consent before obtaining the consumer report from the MIB. In addition, since the MIB report formed part of the basis for the adverse decision in this case, the full Section 615(a) adverse action notice described above must be sent to the consumer.

> *A person with an unfavorable credit history, such as a bankruptcy, is denied automobile insurance at standard rates. Although the credit history was considered in the decision, the applicant's limited driving experience was even more important.*

The applicant is entitled to the Section 615(a) adverse action notice because the credit report played a part, however minor, in the insurer's decision to charge a higher premium.

Non-compliance with the FCRA

There are legal consequences for insurers who fail to get an applicant's permission before requesting a consumer report or who fail to provide required disclosure notices. The FCRA allows individuals to sue insurers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue insurers for non-compliance and obtain civil penalties.

For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC¬HELP (1-877-382-4357); TTY: 1-866-

653-4261. The FTC enters Internet, telemarketing, identity theft, and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

Federal Trade Commission	For The Consumer
1-877-FTC-HELP	**www.ftc.gov**

Federal Trade Commission
Bureau of Consumer Protection
Office of Consumer and Business Education

October 1998

EXHIBIT 25

SCORED MARKETS

Resource Guide

Web sites

- http://www.ftc.gov/bcp/conline/edcams/fcra – Good resource. Includes links to the full text of the Fair Credit Reporting Act, information on what insurers need to know about the use of consumer reports, consumer brochures, and instructions on how a consumer can obtain a copy of their credit report.
- http://www.fairisaac.com – Home page includes sites for FAQ's, facts & fallacies, credit scoring, insurance scoring, and related articles.
- http://www.Choicepointinc.com – Site has limited value. Most of the sub-sites deal with corporate information and topics.
- http://ho_sv007/roadwayonline/2000/february/scoring.htm – "Insurance Scoring 'Takes Underwriting to a Whole New Level'".

Publications from other sources *

- "Insurance Innovations – Consumer Credit Report Information and personal Lines Insurance Underwriting Overview" Fair, Isaac and Company, Incorporated March 1999 **
- "Q & A Consumer Credit Reports and Personal Lines Insurance Underwriting" Fair, Isaac and Company Incorporated March 1999 **
- "Q & A Insurance Bureau Scores Agent's Most Frequently Asked Questions" Fair, Isaac and Company, Incorporated October 1996 1998? **

- "Graphical View of Correlation Between Consumer Credit Information and Insurance Loss Ratio" Fair, Isaac and Company Incorporated March 1999
- "Insurance Issues in the Press" Four articles on use of consumer credit previously published in various insurance periodicals. Fair, Isaac and Company Incorporated.
- "What's Credit Got To Do With It?" Brochure – National Association of Independent Insurers 1999 **

* *Contact bobbos@safeco.com for copies*

** *Previously distributed to PBM's.*

[Attorney Names/Addresses Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. CV 01-1464 BR

LORI SPANO, ET AL.,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF OREGON, ET AL.,
Defendants.

CLASS ACTION

PLAINTIFFS' FOURTH AMENDED COMPLAINT

SUMMARY AND OVERVIEW

1. This is a class action on behalf of all purchasers of personal lines of insurance from defendants from January, 2000 to date (the "Class Period").

2. Defendants sell personal lines of insurance in Oregon and in other states.

3. Since at least January, 2000, defendants have used information contained in consumer reports when underwriting policies for personal lines of insurance. Defendants have taken adverse actions with respect to plaintiffs and those similarly situated based on this information, but failed to provide the notification of the adverse action as required by the Fair Credit Reporting Act, 15 U.S.C. § 1681.

JURISDICTION AND VENUE

4. Jurisdiction is conferred by 15 U.S.C. § 1681. The claims asserted herein arise under 15 U.S.C. § 1681.

5. Venue is proper in this District pursuant to 15 U.S.C. § 1681. Defendants do business in this District and many of the insurance policies involved in this case were issued in this District.

BACKGROUND TO THE CLASS PERIOD

6. Based on information and belief, at least by January, 2000, defendants began using consumer report information to underwrite insurance policies for personal lines of insurance.

FIRST CLAIM FOR RELIEF
For Violation of 15 U.S.C. § 1681

7. Plaintiffs incorporate paragraphs 1 through 6 by reference.

8. Plaintiffs Lori Spano, Shannon Massey and Charles Burr, and all others similarly situated, purchased insurance policies for personal lines of insurance from defendants during the Class Period. Defendants took an adverse action with respect to underwriting the policies of Ms. Spano, Ms. Massey and Mr. Burr, and all others similarly situated, based on information contained in a consumer report.

9. 15 U.S.C. § 1681(m) requires users of consumer reports to provide oral, written or electronic notice of any adverse action taken with respect to any consumer that is based in whole or in part on information obtained in a consumer report.

10. Defendants willfully failed to notify plaintiffs, and all others similarly situated, of the adverse action.

11. 15 U.S.C. § 1681(n) provides that any person who willfully fails to comply with any requirement imposed under § 1681(n) is liable to the consumer for damages of not less than $100 and not more than $1,000. Accord-

ingly, plaintiffs, and all those similarly situated, are entitled to recover statutory damages.

12. Plaintiffs, and all those similarly situated, are also entitled under 15 U.S.C. § 1681(n) to recover such amount of punitive damages as the court may allow.

13. 15 U.S.C. § 1681(n) provides that the cost of the action together with reasonable attorney fees as determined by the court are also recoverable by the plaintiffs, and all others similarly situated.

CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who purchased personal lines insurance policies from defendants from January, 2000 to date.

15. The members of the Class are so numerous that joinder of all members is impracticable. During the Class Period, defendants issued hundreds of policies. The disposition of their claims in a class action will provide substantial benefits to the parties and the Court.

16. There is a well-defined community of interest in the questions of law and fact involved in this case. Questions of law and fact common to the members of the Class which predominate over questions which may affect individual Class members include:

(a) Whether the underwriting practices of defendants constitute adverse actions under the Fair Credit Reporting Act;

(b) Whether 15 U.S.C. § 1681 was violated by defendants;

17. Plaintiffs' claims are typical of those of the Class because plaintiffs and the Class failed to receive notification of the alleged adverse actions as required by the Fair Credit Reporting Act.

18. Plaintiffs will adequately protect the interests of the Class and has retained counsel who are experienced

in class action securities litigation. Plaintiffs have no interests which conflict with those of the Class.

19. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

A. Declaring this action to be a proper class action pursuant to Rule 23;

B. Awarding plaintiffs and the members of the class statutory damages, punitive damages, attorney fees and costs; and

C. Awarding such other legal and equitable relief as the Court may deem just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

Dated this 24th day of April, 2003.

STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.

By: /s/ STEVE D. LARSON

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Attorneys for Plaintiffs

[Attorney Names/Addresses Omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 01-1464 BR

LORI SPANO, ET AL.,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Defendants.

DEFENDANTS' ANSWER, DEFENSES AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' FOURTH AMENDED COMPLAINT FOR VIOLATION OF THE FAIR CREDIT REPORTING ACT

[Jury Trial Demanded]

Defendant SAFECO Insurance Company of America has been granted summary judgment and therefore does not answer. SAFECO Insurance Company of Oregon ("SOO"), SAFECO Insurance Company of Illinois ("SOI"), and American States Insurance Company ("AS") (collectively "Defendants") for their Answer admit, deny and allege as follows:

1.

In response to paragraph 1 of the Complaint, Defendants deny Plaintiffs' allegation that this is a class action because there has been no certification of a class and no other basis alleged authorizing Plaintiffs to appear on behalf of any other person. Defendants deny all remaining allegations in paragraph 1.

2.

In response to paragraph 2 of the Complaint, SOI and AS admit that they each sell personal lines of insurance in Oregon and in other states. SOO admits that it sells personal lines of insurance in Oregon, but denies that it sells personal lines of insurance in other states.

3.

In response to paragraph 3 of the Complaint, Defendants admit that, in or after January 2000, they have used information contained in consumer reports when underwriting policies for personal automobile insurance in Oregon. AS and SOI have also used information contained in consumer reports when underwriting personal automobile insurance in certain other states. Furthermore, Defendants have also used consumer reports to underwrite homeowners and renters insurance. Except as admitted, Defendants deny the allegations in paragraph 3.

4.

In response to paragraph 4 of the Complaint, Defendants admit that Plaintiffs are making their claims under 15 U.S.C. § 1681 and deny all remaining allegations.

5.

In response to paragraph 5 of the Complaint, Defendants admit that they do business in this District and that venue is proper in this District. Except as admitted, Defendants deny the allegations in paragraph 5.

6.

In response to paragraph 6 of the Complaint, Defendants admit that, in or after January 2000, they used consumer report information to underwrite personal lines automobile insurance in Oregon. After January 2000, Defendants have used consumer reports to underwrite homeowner's insurance and renter's insurance. Except as

admitted, Defendants deny the remaining allegations in paragraph 6.

7.

Defendants incorporate by reference their answers to paragraphs 1 through 6 set forth above.

8.

In response to paragraph 8 of the Complaint, each Defendant admits and denies as specifically set forth below:

a. As to Plaintiff Lori Spano, SOO admits that it refused to reinstate an auto insurance policy issued to Ms. Spano that had been cancelled by SOO for failure to pay premium. Separately, SOI admits that Ms. Spano's auto insurance policy was endorsed to it from SAFECO National Insurance Company on or about September 23, 1997. Subsequently, on or about May 11, 2001, Ms. Spano's auto insurance policy was endorsed to SOO. Defendant AS denies any contact with Ms. Spano in the relevant timeframe.

b. As to Plaintiff Massey, SOI admits that on or about January 12, 2001, it provided renters insurance to Ms. Massey. Defendants SOO and AS deny any contact with Ms. Massey.

c. As to Plaintiff Charles Burr, Defendant AS admits providing personal auto insurance to Mr. Burr on or about July 6, 2001. Defendant SOO admits that it issued a separate policy of auto insurance to Mr. Burr on or about October 22, 2002. SOI denies any contact with Mr. Burr.

Except as admitted, Defendants deny all remaining allegations of paragraph 8.

9.

In response to paragraph 9 of the Complaint, Defendants deny that Plaintiffs' attempt to paraphrase 15 U.S.C. § 1681m is accurate or complete, or that any answer is required to paragraph 9. To the extent an answer

is required, Defendants admit that 15 U.S.C. § 1681m sets forth notice requirements on the person taking an adverse action that is based, in whole or in part, on a consumer report, as all relevant terms are defined in the Fair Credit Reporting Act ("FCRA").

10.

Defendants deny that any of them took adverse action as to Plaintiffs Spano, Massey, and/or Burr, and deny the rest and remainder of any allegations in paragraph 10.

11.

In response to paragraph 11 of the Complaint, Defendants deny that Plaintiffs' attempt to paraphrase 15 U.S.C. § 1681n is accurate or complete. Defendants deny the allegations in paragraph 11.

12.

Defendants deny the allegations in paragraph 12 of the Complaint.

13.

In response to paragraph 13 of the Complaint, Defendants deny that Plaintiffs' attempt to paraphrase 15 U.S.C. § 1681n is accurate or complete. Defendants deny the allegations in paragraph 13.

14.

Defendants deny the allegations in paragraph 14 of the Complaint.

15.

Defendants deny the allegations of paragraph 15 of the Complaint, except Defendants admit that they each issued hundreds of policies during the alleged "Class Period."

16.

Defendants deny the allegations in paragraph 16 of the Complaint.

17.

Defendants deny the allegations in paragraph 17 of the Complaint.

18.

Defendants deny the allegations in paragraph 18 of the Complaint.

19.

Defendants deny the allegations in paragraph 19 of the Complaint.

FIRST DEFENSE

(FAILURE TO STATE A CLAIM)

1.

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

(DOCTRINE OF PRIMARY JURISDICTION)

2.

Primary jurisdiction for this matter is vested in the insurance divisions of the respective states at issue.

FIRST AFFIRMATIVE DEFENSE

(STATUTE OF LIMITATIONS)

3.

The claims asserted, or a portion thereof, are barred by the applicable statute of limitations.

SECOND AFFIRMATIVE DEFENSE

(REASONABLE PROCEDURES TO ASSURE COMPLIANCE)

4.

Pursuant to 15 U.S.C. § 1681m(c), reasonable procedures were in place to assure compliance with the provisions of 15 U.S.C. § 1681 and therefore Defendants may not be held liable for the alleged violations of the Fair Credit Reporting Act.

WHEREFORE, having fully answered Plaintiffs' Complaint, and having alleged affirmative defenses, Defendants pray for entry of Judgment as follows:

a. Denying any request to certify this matter as a class action;

b. Entry of Judgment dismissing Plaintiffs' Complaint and granting Judgment in favor of Defendants; and

c. Including in the Judgment an award to Defendants of their reasonable costs.

Dated this 12th day of May 2003.

BULLIVANT HOUSER BAILEY, PC

By /s/ JOHN A. BENNETT

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Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

September 26, 2006

Mr. Michael K. Kellogg
1615 M St., NW
Suite 400
Washington, DC 20036

Re: Safeco Insurance Company of America, et al.
v. Charles Burr, et al.
No. 06-84

Dear Mr. Kellogg:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The case is consolidated with No. 06-100 and a total of one hour is allotted for oral argument.

Sincerely,

/s/ WILLIAM K. SUTER
William K. Suter, Clerk

643 K

(21)

No. 06-84

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a defendant can be found liable for a "willful" violation of the Fair Credit Reporting Act ("FCRA") upon a finding of "reckless disregard" for FCRA's requirements, in conflict with the unanimous holdings of other circuits that "willfulness" requires actual knowledge that the defendant's conduct violates FCRA.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Safeco Corporation was named as a defendant in the original complaint but subsequently was voluntarily dismissed from the case by plaintiffs during the district court proceedings.

Charles Burr and Shannon Massey were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings. Lori Spano, Alan Opoien, Patricia McGrath, and Joan Horton were also at one time or another, and some still are, plaintiffs in the district court proceedings, but none of them participated in the court of appeals proceedings and thus are not respondents in this case.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon state the following:

Safeco Insurance Company of Oregon is a wholly owned subsidiary of Safeco Insurance Company of America. Safeco Insurance Company of America, American States Insurance Company, and Safeco Insurance Company of Illinois are wholly owned subsidiaries of Safeco Corporation, a publicly traded company. Safeco Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The memorandum order of the Ninth Circuit (Pet. App. 1a-2a) is unreported but is available at 140 F. App'x 746, 2005 WL 1865971. The Ninth Circuit based its decision in this case, as well as in several related cases, entirely on its published opinion in two other related and consolidated cases, *Reynolds v. Hartford Financial Services Group, Inc.* and *Edo v. GEICO Casualty Co.* The original consolidated opinion in *Reynolds* and *Edo* is reported at 416 F.3d 1097 (Pet. App. 37a-68a). On petitions for rehearing and rehearing *en banc*, the panel withdrew its original opinion and issued a modified opinion, which, as amended, is reported at 426 F.3d 1020 (Pet. App. 69a-101a). On defendants' second petition for rehearing and rehearing *en banc*, the panel issued yet another modified opinion, which is reported at 435 F.3d 1081 (Pet. App. 102a-131a). The district court's April 21, 2003 opinion and order (Pet. App. 15a-35a) is reported at 215 F.R.D. 601; its March 3, 2004 opinion and order (Pet. App. 3a-14a) is not reported.

JURISDICTION

The judgment of the Ninth Circuit (Pet. App. 1a-2a) was entered on August 4, 2005. The Ninth Circuit denied a timely petition for rehearing and rehearing *en banc* on April 20, 2006. *See* Pet. App. 36a. The petition for a writ of certiorari was filed on July 19, 2006, and was granted on September 26, 2006 (JA 81). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* ("FCRA"), are set forth in the statutory addendum to this brief.

STATEMENT OF THE CASE

Under FCRA, if a "user" of consumer reports takes an "adverse action" based on information contained therein, that user must provide the consumer with an "adverse action" notice containing specified information. *See* 15 U.S.C. § 1681m. In the insurance context, an "adverse action" triggering FCRA's notice requirement is defined as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." *Id.* § 1681a(k)(1)(B)(i).

Respondents Charles Burr and Shannon Massey are two of three co-representatives of a purported class consisting of "all purchasers of personal lines of insurance from" petitioners for the period January 2000 to the date of the complaint. JA 71 (Fourth Am. Compl. ¶ 1). Petitioners are, directly or indirectly, wholly owned by Safeco Corporation (collectively, "Safeco" or "petitioners"). Respondents claimed that petitioners took "adverse actions with respect to plaintiffs and those similarly situated" based on information in those plaintiffs' consumer credit reports and then willfully "failed to provide . . . notification of the adverse action," as required by § 1681m. *Id.* (Fourth Am. Compl. ¶ 3).

Respondents' complaint alleged *no* actual damages to themselves or to the class, but instead sought to recover statutory damages, punitive damages, costs, and attorney's fees. *See* JA 72-73 (Fourth Am. Compl. ¶¶ 11-13).[1] Under FCRA, recovery of statutory and punitive damages is permitted only on proof that a person "*willfully* fail[ed] to comply" with FCRA. *See* 15 U.S.C. § 1681n(a) (passed as § 616 of FCRA) (emphasis added). Recovery for a "negligent" failure to comply with FCRA is restricted to actual damages, costs, and attorney's fees. *See id.* § 1681o

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[1] After remand from the court of appeals, respondents dropped their claim for punitive damages. *See* Pet. Reply 4 n.2.

(passed as § 617 of FCRA). The definition of a "willful" violation of FCRA is at the heart of this case.

Respondents' theory of liability was that Safeco had taken an "adverse action" against them based on their consumer credit information, not because Safeco had increased the premium on an *existing* insurance policy, but because it had used consumer credit information in setting the *initial* premium on a *new* insurance policy higher than the best possible rate that the insurer offered to others for the relevant form of insurance. This theory of "adverse action" had never been adopted by any court at the time of respondents' complaint.

Safeco moved for summary judgment on the ground that its actions in offering an initial premium higher than the best possible rate did not trigger a notice requirement under FCRA. The district court agreed. It held that FCRA "'unambiguously'" does not require an adverse-action notice where an insurer uses credit information in setting an initial premium. Pet. App. 11a-12a (quoting *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003)). It observed that the "'common and ordinary meaning'" of the term "increase" is to "'make[] greater,'" *id.* at 11a (quoting *Mark*, 275 F. Supp. 2d at 1317), and it therefore concluded that § 1681a(k)(1)(B)(i)'s definition of "adverse action" — which covers "an increase in any charge for . . . insurance" — "'unambiguously means an insurer does not increase a charge for insurance unless the insurer charges an insured one price for insurance and then subsequently increases that charge based on information in the insured's consumer credit report,'" *id.* at 11a-12a (quoting *Mark*, 275 F. Supp. 2d at 1317).

The Ninth Circuit reversed. *See id.* at 1a-2a, 102a-131a. It held that Safeco had taken an adverse action against respondents in its offer of initial coverage because the phrase "increase in any charge" covers "a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price." *Id.* at 114a-117a; *see id.* at 2a. In the

court's view, an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top *potential* score." *Id.* at 118a (emphasis added). This was the first time that such an expansive definition of "adverse action" had been accepted by any court.

The Ninth Circuit went on to reject Safeco's alternative ground for affirmance of the district court's summary judgment — namely, that Safeco's conduct could not have been "willful" in light of the competing interpretations of the statute and the absence of any judicial or administrative decision defining "adverse action" to cover initial policies of insurance. On this point, the Ninth Circuit departed from the law of every other circuit to address the issue and held that "willfully" under FCRA requires mere "reckless disregard" for, rather than actual knowledge of, the Act's requirements. Further, notwithstanding the district court's holding that Safeco's legal position on the "best rate" issue was "unambiguously" correct, the Ninth Circuit declared that Safeco's position was so "indefensible" and "implausible" as to create a triable issue on the question of willfulness under the court's newly fashioned "reckless disregard" standard. *Id.* at 129a.

A. Background of FCRA

FCRA was enacted in 1970 primarily to regulate "consumer reporting agenc[ies]," which are broadly defined to include companies that collect, compile, and furnish "consumer reports." 15 U.S.C. § 1681a(f). A "consumer report" includes any information communicated to a third party that "bear[s] on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" and that is used (or expected to be used) in determining the consumer's eligibility for credit, insurance, employment, or certain other purposes. *Id.* § 1681a(d).

Congress viewed the accurate reporting of consumer information as important "to promote efficiency in the Nation's banking system and to protect consumer privacy."

TRW Inc. v. Andrews, 534 U.S. 19, 23 (2001). Thus, for example, FCRA requires a consumer reporting agency (*e.g.*, a credit bureau such as Experian, Trans Union, and Equifax) to: (i) maintain "reasonable procedures to assure maximum possible accuracy of the information" the agency reports on consumers; (ii) exclude obsolete information from consumer reports; (iii) disclose consumer reports only to those that have one of the specified permissible purposes to receive them; (iv) allow consumers to access their consumer file and correct information the agency maintains about them; and (v) "reinvestigate" information in the report that the consumer disputes, and delete any information that cannot be verified. *See* 15 U.S.C. §§ 1681c, 1681e, 1681g, 1681h, 1681i.

FCRA remained largely unchanged until 1996, when Congress passed extensive amendments as part of the Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, Div. A, Tit. II, Subtit. D, 110 Stat. 3009, 3009-426 ("CCRRA"). Among other revisions, these amendments expanded FCRA to cover not only consumer reporting agencies, but also "furnishers of information" — *i.e.*, any "person" that generates consumer credit information and provides it to a consumer reporting agency. *Id.* § 1681s-2(a); *see id.* § 1681a(b) (defining "person" to include individuals and corporate entities). Information furnishers must, among other things, provide accurate information to credit reporting agencies; investigate disputed information from customers; and inform customers about negative information that may be put in their consumer report. *See id.* § 1681s-2(a), (b).

Most pertinent to this case, FCRA also imposes obligations on a third group — namely, users of consumer reports. *See id.* § 1681m. Although the term "user" is not defined in FCRA, it is understood to include any person or entity that obtains consumer reports to determine the consumer's eligibility for credit, insurance, employment, and the other purposes enumerated in § 1681a(d). In recent years, insurance companies such as Safeco have

begun to use such information in the underwriting of insurance. *See id.* § 1681a(d)(1)(A) (defining "consumer report" to include information used for "insurance" of a "personal, family, or household" nature); *id.* § 1681b(a)(3)(C) (defining underwriting of insurance as a permissible purpose for obtaining consumer reports).

Users may obtain consumer reports only for one of the permissible purposes enumerated in the statute, and they must certify to the consumer reporting agency that they will not use the reports for any other purpose. *See id.* §§ 1681b, 1681e(a). Moreover, users of consumer-credit information are required by FCRA to provide notices containing specified information if they take any of a number of defined "adverse actions" against a consumer based in whole or in part on a consumer report. *See id.* § 1681m(a) (requiring notices where the user "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report").

B. Respondents' Claims

On October 2, 2001, plaintiff Lori Spano filed, in the United States District Court for the District of Oregon, a purported nationwide class action against Safeco Corporation for alleged violations of FCRA's "adverse action" notice requirement. The complaint alleged that Safeco Corporation's failure to provide such notices was "willful" and thus entitled plaintiffs to class-wide statutory damages, punitive damages, and attorney's fees under § 616 of FCRA, 15 U.S.C. § 1681n. *See* Pet. App. 3a-4a, 23a, 26a. The complaint contained no allegation that plaintiffs had suffered any actual damages. *See id.* at 4a, 26a.

Spano claimed that she purchased an automobile insurance policy from Safeco National Insurance Company that was subsequently endorsed to Safeco Insurance Company of Oregon ("Safeco-Oregon"). The policy was cancelled four times for failure to pay the premium; each time, it was reinstated by Safeco-Oregon without reference to any consumer credit information. After the policy was

cancelled for a fifth time, Spano requested that Safeco-Oregon reinstate it yet again. Safeco-Oregon declined to do so, based in part on information contained in a consumer credit report. Spano alleged that this decision not to reinstate was an "adverse action" under FCRA entitling her to notice. *See id.* at 4a, 5a.

Spano later added other named plaintiffs, including respondents Massey and Burr. *See id.* at 24a; JA 4, 72 (Fourth Am. Compl. ¶ 8). Burr applied for automobile insurance in July 2001 and was issued a policy by American States Insurance Company ("American States"). *See* Pet. App. 4a. American States underwrote the policy through InsurQuest, a program designed for high-risk drivers. *See* E.R.[2] 4 (¶ 11). InsurQuest places a driver into one of five pricing tiers, designated A through E, based on the totality of the driver's underwriting characteristics. *See id.* Burr was placed in Tier D, mainly because of his poor driving record. *See id.* Although his consumer credit information was consulted in placing him in Tier D, even the most favorable credit score would not have improved his tier placement or reduced his premium. *See id.*; Pet. App. 4a. After the American States policy lapsed for failure to pay premiums on July 7, 2002, Burr purchased a new policy from Safeco-Oregon, which relied on information in Burr's consumer credit report in setting the amount of Burr's initial premium. *See* Pet. App. 4a-5a.

Massey applied for renters insurance from Safeco Insurance Company of Illinois ("Safeco-Illinois") in January 2001. Safeco-Illinois used a consumer credit report in connection with the underwriting of Massey's policy. Safeco-Illinois has three tiers of renters insurance. Based on the totality of the circumstances relevant to her application, Safeco-Illinois placed Massey in a tier with a higher premium rate. *See id.* at 4a.[3]

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[2] "E.R." refers to the Excerpts of Record filed in the court of appeals.

[3] Originally, the sole defendant in the district court was Safeco Corporation. After Burr and Massey were added as plaintiffs, plaintiffs

C. The District Court's Decision

On March 3, 2004, the district court granted Safeco's motion for summary judgment against Burr and Massey on the ground that no "adverse action" had been taken against either of them. Pet. App. 11a-12a. Relying on its previous decision in *Mark v. Valley Insurance Co.*, the court agreed with Safeco that an "adverse action" occurs only when an insurance company "increases" — *i.e.*, "'makes greater'" — a premium that the company had previously charged the consumer for insurance. Pet. App. 11a (quoting 275 F. Supp. 2d at 1317). The court held that FCRA was "'unambiguous[]'" on this score, and it reaffirmed its conclusion in *Mark* that FCRA "'reasonably cannot be read to mean an insurer takes adverse action if it initially charges an insured more than its optimal rate based on information in the insured's consumer credit report.'" *Id.* (quoting 275 F. Supp. 2d at 1317). The district court accordingly dismissed the claims of Burr and Massey because neither had an existing policy with the issuing company at the time he or she applied for insurance. *See id.* at 12a.

As to plaintiff Spano, however, the court denied Safeco's motion for summary judgment. It held that Spano's "request for reinstatement" of her previously cancelled policy was an "application for insurance" and that FCRA's notice requirement was triggered when Safeco-Oregon

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voluntarily dismissed Safeco Corporation as a defendant and substituted Safeco Insurance Company of America ("Safeco-America"). Safeco-America moved to dismiss on the ground that the policies purchased by the three named plaintiffs were issued not by Safeco-America, but by its affiliates, Safeco-Oregon, Safeco-Illinois, and American States. In an opinion and order dated April 21, 2003, the district court granted Safeco-America's motion for summary judgment, holding that only a person who contracts with the insured can take an "adverse action" under § 1681m(a). *See* Pet. App. 20a-22a. The Ninth Circuit reversed this ruling. *See id.* at 2a. The district court also granted plaintiffs' motion to file a Fourth Amended Complaint substituting the issuing insurers as defendants. *See id.* at 34a.

"denied" the application on the basis of information in her consumer credit report. *Id.* at 12a-13a.

After the district court entered final judgment against plaintiffs Burr and Massey under Federal Rule of Civil Procedure 54(b), they appealed. *See* JA 17. By stipulation of all parties, further proceedings as to plaintiff Spano were stayed pending the disposition of the appeal. *See id.*

D. The Ninth Circuit's Decision

The Ninth Circuit reversed the grant of summary judgment to Safeco based on the reasoning in its concurrently filed decision in *Reynolds* and *Edo*. Whereas the district court had concluded that the meaning of "increase" "unambiguously" required an addition to some previous charge, and thus could not apply to a "single *initial* charge for the insurance coverage," Pet. App. 11a-12a (emphasis added), the Ninth Circuit adopted the so-called "best rate" theory, concluding that the "clear" and "ordinary meaning" of "increase" covered "a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price," *id.* at 114a-117a. *See id.* at 1a-2a.

Again relying on *Reynolds* and *Edo*, the Ninth Circuit also rejected Safeco's alternative contention that its conduct was not "willful" and therefore could not give rise to liability for statutory and punitive damages under § 1681n. In an acknowledged departure from the decisions of the Sixth and Eighth Circuits, both of which require "actual knowledge with regard to the law" as a prerequisite to the imposition of statutory and punitive damages, the Ninth Circuit held that a "willful" violation of FCRA could be established if a company performs an act that in fact violates FCRA "either knowing that the action violates the rights of consumers or in reckless disregard of those rights." *Id.* at 128a-129a & n.17; *see id.* at 2a. The Ninth Circuit purported to follow this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), which held that "reckless disregard" was a

"reasonable" way of interpreting "willful" in the context of the liquidated damages provision of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626(b), "[g]iven the legislative history" of that provision, 469 U.S. at 126. *See* Pet. App. 127a.

In its initial opinion in *Reynolds* and *Edo* dated August 4, 2005, the Ninth Circuit panel divided on the proper disposition of the case. The panel majority, consisting of Judge Reinhardt and Judge Berzon, not only reversed the district court's grant of summary judgment to the defendant companies, but also effectively granted summary judgment to plaintiffs, despite the fact that plaintiffs had never requested such relief. The majority stated that defendants' interpretation of "adverse action" was "objectively unmeritorious," "not reasonable," and "counter to the statute's plain text." *Id.* at 64a. It followed, in the majority's view, that "defendants all acted in reckless disregard of the consumers' statutory rights." *Id.* at 65a. Judge Bybee dissented, stating that he would remand the case because he "[could not] conclude on the basis of the record before [him] that the companies' actions . . . were so 'objectively unmeritorious' . . . that [the court] [could] decide their willfulness . . . without the benefit of findings of fact." *Id.* at 68a.

On petition for rehearing and rehearing *en banc*, the panel issued a modified opinion on October 3, 2005.[4] The modified opinion merely altered several phrases in the initial opinion — for example, replacing the characterizations "unreasonable" and "not reasonable" with "indefensible" and "untenable," and "objectively unmeritorious" with "plainly unmeritorious." *Id.* at 96a-97a. In response, Judge Bybee expanded his dissent. He stated that, on the record before him, he would "not find that [Safeco] willfully failed to comply with FCRA as a matter of law."

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[4] The panel amended its October 3, 2005 opinion *sua sponte*, in an unpublished order issued on October 24, 2005. That amendment affected only footnote 7 and was incorporated into the October 3 opinion reported at 426 F.3d 1020 (reproduced at Pet. App. 69a-101a).

Id. at 100a. Although Judge Bybee agreed with the majority that the district court's interpretation of § 1681a(k)(1)(B)(i) was incorrect, he could not "go so far as to conclude that the district court's conclusion, like [Safeco's] position, was also untenable." *Id.*

After a second petition for rehearing and rehearing *en banc*, the panel issued yet another modified opinion on January 25, 2006. This time, instead of effectively granting summary judgment to plaintiffs on the ground that Safeco's conduct was willful as a matter of law, the panel remanded the case for the district court to apply the "reckless disregard" standard in the first instance. *See id.* at 129a; *id.* at 2a.

In so doing, the Ninth Circuit instructed that, in the proceedings on remand, the district court should engage in a subjective inquiry into the company's motives. Safeco had urged a finding that as a matter of law its reading of FCRA was not objectively unreasonable, given that the term "adverse action" was at best ambiguous in its application to the circumstances presented here (and had been found unambiguously to support a contrary result by the district court) and given the lack of any prior judicial guidance supporting the Ninth Circuit's construction. The court of appeals nevertheless apparently deemed Safeco's interpretation "implausible," warranting a further subjective inquiry. *Id.* at 129a. The court also opined that, on remand, Safeco's good-faith reliance on the advice of its counsel would "not [be] dispositive," *id.*, a holding that the court deemed necessary to avoid "creat[ing] perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 128a. The Ninth Circuit thus directed the district court to require Safeco to introduce "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* at 129a.

SUMMARY OF ARGUMENT

The Ninth Circuit erroneously interpreted "willfully" in § 1681n to mean with "reckless disregard" for, rather than actual knowledge of, the requirements of FCRA. The text, history, structure, and purposes of FCRA, as well as the consistent interpretation of § 1681n by eight other circuits for more than 20 years, all support the conclusion that "willfully" in this context requires proof that the defendant intentionally violated a known legal duty. But even if "willfully" could reasonably include some acts taken without knowledge of their illegality, the Ninth Circuit erred in holding that Safeco could be liable for a "willful" violation in the circumstances of this case. Safeco's reading of "adverse action" did not involve the kind of objectively indefensible interpretation that, at a minimum, should be necessary for a "willful" violation. Moreover, there is no statutory or precedential basis for the Ninth Circuit's requirement that courts look behind good-faith reliance on legal advice in determining willfulness.

The Ninth Circuit's decision furthers no legitimate statutory purpose. Instead, it simply rewards plaintiffs' lawyers with enormous recoveries for what a single court determines, in hindsight and without any basis in prior precedent, to be a violation of highly technical statutory provisions, even where there is no claim that any consumer has actually been damaged. That result is not, and cannot be, what Congress intended when it enacted FCRA.

I. The text, history, structure, and purposes of FCRA all indicate that, to establish a "willful" violation under § 1681n, one must show a deliberate violation of a known legal duty, not mere reckless disregard for the possibility that one's conduct is unlawful.

A. 1. The text of § 1681n(a) confirms that Congress meant "willfully" to mean acting with "actual knowledge" of, rather than mere "reckless disregard" for, the statute's requirements. Section 1681n(a)'s civil remedy for "willful" violations applies to all substantive "requirements" of

FCRA, but Congress singled out one such requirement for specific mention — namely, obtaining a consumer report "knowingly without a permissible purpose." 15 U.S.C. § 1681n(a)(1)(B). That prohibited conduct — which was perhaps Congress's central concern in passing FCRA — requires actual knowledge of the law (namely, the permissible uses of consumer reports under § 1681b). Because the term "willfully" in § 1681n(a) necessarily applies to the violation identified in subsection (a)(1)(B), it cannot sensibly be read to mean mere reckless disregard. It would be illogical to prohibit *recklessly* obtaining a consumer report "knowingly without a permissible purpose." Moreover, it would be odd for Congress to require a lower level of intent for conduct that was of secondary concern relative to the improper use of consumer reports.

The language of § 1681n(b) fortifies that conclusion. That subsection creates a separate civil damages action for a consumer reporting agency harmed by anyone obtaining a consumer report "knowingly without a permissible purpose." This section also requires actual knowledge, but, unlike § 1681n(a), it does *not* allow punitive damages even for a knowing violation. Given that punitive damages are a "quasi-criminal" remedy, it would also be irrational for Congress to permit such damages in § 1681n(a) on a showing of intent lesser than that required in § 1681n(b).

2. This reading of § 1681n is further buttressed by the overall remedial structure of FCRA — in particular, §§ 1681q and 1681s. Section 1681s allows the Federal Trade Commission ("FTC"), the agency charged with enforcing FCRA, to bring an action for a civil penalty of up to $2,500 per violation, with no provision for punitive damages, against any person "[i]n the event of a knowing violation, which constitutes a pattern or practice of violations of [FCRA]." 15 U.S.C. § 1681s(a)(2)(A). As with § 1681n(b), it would have been bizarre for Congress to impose a lower standard of intent in § 1681n(a), which *does*

authorize punitive damages, than in § 1681s(a)(2)(A), which, like § 1681n(b), clearly requires actual knowledge.

Section 1681q provides for criminal liability (in the form of both fines and imprisonment) for anyone who "knowingly and willfully" obtains a consumer report under false pretenses. "Willfully" in the context of § 1681q clearly requires actual knowledge, and the word should be given the same meaning in § 1681n. Congress's 1996 amendments back up this conclusion. Prior to 1996, courts had held that criminal liability for "knowingly and willfully" violating § 1681q could be a ground for civil liability, but only under § 1681n (for "willful" violations), not § 1681*o* (for "negligent" violations), because one cannot "negligently" violate a statute requiring "knowing and willful" conduct. In 1996, Congress effectively codified these decisions by expressly allowing for enhanced recovery for such violations under § 1681n, but not § 1681*o*. *See id.* § 1681n(a)(1)(B). This confirms that a "willful" violation under § 1681n requires the same level of intent as that required to show a criminal violation under § 1681q.

B. The drafting history of FCRA also confirms that "willfully" in § 1681n requires actual knowledge, not mere reckless disregard. The Senate bill containing FCRA originally provided that recovery of *actual* damages under current § 1681*o* required a showing of "gross[] negligen[ce]" — a term that is synonymous with "reckless disregard." "Willfully," the threshold condition for statutory and punitive damages, must therefore have required something more than gross negligence or reckless disregard — namely, actual knowledge of the illegality of the conduct. Although the Conference Committee reduced the *scienter* requirement in § 1681*o* from gross negligence to ordinary negligence, it did not make any corresponding change in the "willfully" standard, indicating that the Senate's original meaning was enacted in the final legislation. Beyond that, Congress had before it alternative bills that expressly authorized statutory and punitive damages for reckless conduct, but it chose not to enact them.

C. The courts of appeals have consistently held since at least the mid-1980s that civil liability for willful violations under § 1681n requires that the defendant act "knowingly," "intentionally," or with "conscious disregard" of the law. Mere "reckless disregard" of the law's requirements does not constitute a "willful" violation under this standard. Congress has overhauled FCRA several times, and amended § 1681n in particular, without disturbing these decisions, which were unanimous until the Ninth Circuit's decision below. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), by contrast, this Court adopted a "reckless disregard" standard under the ADEA only after finding that Congress had passed that statute against the backdrop of the opposite judicial consensus.

D. A requirement of actual knowledge also advances the goals of FCRA better than the alternative. FCRA already provides for compensatory damages, as well as costs and attorney's fees, for negligent violations. *See* 15 U.S.C. § 1681*o*. Section 1681n calls for potentially enormous statutory and punitive damages and should therefore be reserved for the most egregious, deliberate conduct. Allowing these remedies on a showing of mere "reckless disregard" will impose enormous compliance costs on American businesses, lead to a flood of unnecessary and likely confusing notices to consumers, chill legitimate business activities, and frustrate Congress's goal of balancing consumer interests and the legitimate commercial use of consumer credit information.

E. Any residual ambiguity should be resolved in favor of a requirement of actual knowledge under the rule of lenity. That interpretive canon should apply to § 1681n given the "quasi-criminal" character of statutory and punitive damages provisions. The canon is of added importance in construing a statute like FCRA, which permits the imposition of massive liability without *any* showing of actual damages or any cap on class-action damages.

F. Under an actual-knowledge standard, Safeco was entitled to summary judgment because no court had ever declared that companies must send adverse-action notices in the context of initial policies of insurance, and Safeco could therefore not have known of its legal duty to do so.

II. Even if this Court were to conclude that "willfully" under FCRA could, in some cases, cover conduct engaged in without knowledge of its illegality, this Court should reject the Ninth Circuit's extreme interpretation and application of the term in this case.

A. As a matter of law, a legal interpretation that is not objectively indefensible cannot be reckless or willful. Here, petitioners' interpretation was far from legally indefensible. The only adverse action alleged by respondents is an "increase in any charge" for insurance. One cannot "increase" a charge that does not yet exist; the relevant statutory phrase does not naturally include an increase relative to a nonexistent, hypothetical charge. The Ninth Circuit's view that Safeco's reliance on that interpretation was so plainly unreasonable that it amounts to a "willful" violation of FCRA is untenable, especially given the technical nature of the issue, the district court's conclusion that the statute "unambiguously" *supported* Safeco's interpretation, and the lack of any prior case law to the contrary.

B. The Ninth Circuit also erred in concluding that a company can be deemed to have violated FCRA "willfully" despite good-faith reliance on the advice of its counsel if its legal position is later deemed "implausible" by an appellate court. That holding is contrary to this Court's decisions, and it would lead to intrusive and unwarranted factual investigations into the attorney-client relationship, as well as the decision-making processes of American corporations. It would also force companies to incur potentially enormous and unnecessary compliance costs, out of concern that their good-faith judgments about the proper interpretation of FCRA will, in hindsight, be deemed "willful."

ARGUMENT

I. THE TERM "WILLFULLY" IN FCRA REQUIRES THAT A DEFENDANT COMMIT A VOLUNTARY ACT IN CONTRAVENTION OF A KNOWN LEGAL DUTY

The term "willful" or "willfully" in federal statutes has been given "'many meanings,'" and it is therefore impossible to say that any single interpretation is always plain. *Bryan v. United States*, 524 U.S. 184, 191 (1998) (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). At times, "willful" has been held merely to "denote[] an act which is intentional, or knowing, or voluntary, as distinguished from accidental." *United States v. Murdock*, 290 U.S. 389, 394 (1933). This Court has recognized, however, that Congress generally intends "willful" to require a measure of *scienter*. In some cases, this Court has construed the term to mean a "voluntary, intentional violation of a known legal duty" — *i.e.*, to take an action despite actual knowledge that it is contrary to the law's demands. *United States v. Bishop*, 412 U.S. 346, 360 (1973) (citing, *inter alia*, *Murdock*, 290 U.S. at 398); *Bryan*, 524 U.S. at 191 n.12 ("[t]he word is also employed to characterize a thing done without ground for believing it is lawful"); *see also Bryan*, 524 U.S. at 196; *Ratzlaf v. United States*, 510 U.S. 135, 146 (1994); *Cheek v. United States*, 498 U.S. 192, 201 (1991). In other contexts, specifically the ADEA and the Fair Labor Standards Act of 1938 ("FLSA"), this Court has held that willfulness is satisfied by a lower "reckless disregard" standard. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985) (holding that "a violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA") (internal quotation marks omitted); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988) (applying same standard to the FLSA's statute of limitations provision); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993).

The choice among these competing options "'is often influenced by [statutory] context.'" *Ratzlaf*, 510 U.S. at 141 (quoting *Spies*, 317 U.S. at 497) (alterations in original omitted). In the case of § 1681n, all the interpretive guideposts point toward construing "willfully" to require a "voluntary, intentional violation of a known legal duty." The reasonableness of this conclusion is reinforced by this Court's decisions stating that "willfully" should be construed narrowly in the context of "highly technical statutes that present[] the danger of ensnaring" persons engaged in conduct that is not obviously unlawful. *Bryan*, 524 U.S. at 194 (citing *Ratzlaf*).

A. The Language of § 1681n and FCRA's Other Remedial Provisions Support an Actual-Knowledge Requirement

Every textual indicator in FCRA points toward the conclusion that the term "willfully" in § 1681n requires proof of an intentional violation of a known legal duty.

1. The Text of § 1681n Indicates That "Willfully" Requires Actual Knowledge, Not Mere Reckless Disregard

a. Section 1681n(a). The term "willfully" in § 1681n(a) must logically entail an actual-knowledge requirement because that section encompasses a substantive violation in § 1681n(a)(1)(B) that expressly requires knowledge as an element. Under § 1681n(a), "[a]ny person who willfully fails to comply with any requirement" of FCRA "with respect to any consumer is liable to that consumer" for specified damages — including the greater of actual or statutory damages (§ 1681n(a)(1)), punitive damages (§ 1681n(a)(2)), and costs and attorney's fees (§ 1681n(a)(3)).

Section 1681n(a)(1) goes on to specify two tiers of actual and statutory damages for two circumstances covered by § 1681n(a). Under § 1681n(a)(1)(A), the default recovery for an ordinary willful violation of FCRA is "any actual damages sustained by the consumer . . . or damages of not

less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). Section 1681n(a)(1)(B) provides that, "in the case of liability of a natural person for obtaining a consumer report under false pretenses or *knowingly* without a permissible purpose," plaintiffs may recover "actual damages sustained by the consumer . . . or $1,000, whichever is greater." *Id.* § 1681n(a)(1)(B) (emphasis added). In both circumstances, plaintiffs may also recover punitive damages and attorney's fees. *Id.* § 1681n(a)(2), (3). In all events, recovery under *either* § 1681n(a)(1)(A) or § 1681n(a)(1)(B) must still be predicated on a *willful* violation of FCRA. *See id.* § 1681n(a).

The violation covered by § 1681n(a)(1)(B) — obtaining a consumer report "under false pretenses or *knowingly without a permissible purpose*" — clearly requires knowledge of the relevant legal standard governing the acceptable uses of consumer reports. *See id.* § 1681b. Although the word "knowingly" sometimes implies mere factual knowledge, *see Bryan*, 524 U.S. at 192, the straightforward grammatical reading of § 1681n(a)(1)(B) is that the adverb "knowingly" modifies "without a permissible purpose," such that knowledge of the unlawfulness of the purpose is required. Mere neglect, or even reckless disregard of the possibility that an intended use might not be permitted, is not enough. The natural reading of § 1681n(a)(1)(B) is buttressed by the statutory presumption that *scienter* terms such as "knowingly" are broadly applied to cover the relevant statutory elements giving rise to liability, even when such an interpretation would *deviate* from the "most natural grammatical reading" of the statute. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68, 69-71 (1994) (citing numerous cases).[5]

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[5] This canon has particular force given that FCRA's parallel criminal provision provides for criminal fines and up to two years' imprisonment for "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q.

In light of the fact that § 1681n(a)(1)(B) encompasses an offense with a *scienter* requirement of actual knowledge, the term "willfully" in § 1681n(a) — which applies equally to both subsections of § 1681n(a)(1) — cannot be read to mean mere recklessness. Simply put, it makes no sense to read § 1681n(a) and § 1681n(a)(1)(B) together to provide for damages for *recklessly* obtaining a consumer report "knowingly without a permissible purpose." *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Because willfulness *can only* mean actual knowledge in the context of § 1681n(a)(1)(B), it should be given a similar meaning as applied to § 1681n(a)(1) in all its applications. *See Ratzlaf*, 510 U.S. at 143 ("A term appearing in several places in a statutory text is generally read the same way each time it appears," and there is "even stronger cause to construe a *single* formulation . . . the same way each time it is called into play.") (citing *United States v. Aversa*, 984 F.2d 493, 498 (1st Cir. 1993) (en banc), *vacated and remanded on other grounds sub nom. Donovan v. United States*, 510 U.S. 1069 (1994)).

Moreover, interpreting "willfully" to require less than actual knowledge would undermine the rationality of Congress's remedial scheme. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.") (internal quotation marks and citations omitted). Congress's central concern in passing FCRA was to eliminate certain impermissible and abusive uses of consumer information. *See, e.g.*, 15 U.S.C. § 1681(b) (noting the need for "reasonable procedures" to ensure the "proper utilization" of consumer information). Notably, the only criminal penalties in FCRA relate to this type of conduct. *See id.* §§ 1681q, 1681r. The prohibition on obtaining consumer information for

impermissible purposes is thus at the heart of FCRA's objectives, yet Congress chose to require a showing of *actual knowledge* as a precondition to both the award of statutory and punitive damages and the imposition of criminal sanctions. *See also infra* pp. 23-25 (explaining that the derivation of § 1681n(a)(1)(B) from FCRA's criminal provision, § 1681q, provides further proof that actual knowledge is required under both). It would be peculiar to conclude, as the Ninth Circuit did, that a *lower* threshold of intent — "reckless disregard" — is sufficient in other contexts (such as the failure to provide a notice) that are closer to the periphery of Congress's concerns. *See also* 15 U.S.C. § 1681m(h)(8) (codifying 2003 amendment to FCRA eliminating civil cause of action under either § 1681n or § 1681o for violations of § 1681m).

b. Section 1681n(b). A comparison of § 1681n(b) with § 1681n(a) confirms that "willfully" cannot mean "with reckless disregard." Section 1681n(b) provides that "[a]ny person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages . . . or $1,000, whichever is greater." 15 U.S.C. § 1681n(b). As explained above, the language of § 1681n(b) requires actual knowledge that the purpose for which the report was obtained is legally impermissible; this is the most grammatically natural reading of the phrase "knowingly without a permissible purpose," and it comports with the presumption that the term "knowing" applies to *all* elements needed to give rise to liability.

Section 1681n(b), unlike § 1681n(a), provides for neither punitive damages nor costs and attorney's fees. Given that punitive damages are generally reserved for the most reprehensible conduct, *see BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996), judged by the defendant's mental state, *see Kolstad v. American Dental Ass'n*, 527 U.S. 526, 538 (1999), Congress must have intended the *mens rea* to be *at least as high* for § 1681n(a) as for

§ 1681n(b). It would impute to Congress a high degree of irrationality to interpret § 1681n(a), which allows for the "extraordinary sanction" of punitive damages, *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979), to have a lower *scienter* requirement than § 1681n(b), which does not. The Ninth Circuit's contrary interpretation is flawed because it leads to an anomalous outcome that is inconsistent with the structure of FCRA as a whole. *See Brown & Williamson*, 529 U.S. at 132-33; *Thurston*, 469 U.S. at 128 (courts should "decline to interpret" provisions in a way that frustrates Congress's intent to create a rational tiered liability scheme).

2. Defining Willfulness As Mere Reckless Disregard Is Inconsistent with the Remedial Structure of FCRA As a Whole

This reading of § 1681n(a) is reinforced by the statute's overall remedial scheme. In particular, the language of §§ 1681q and 1681s bolsters the conclusion that to act "willfully" under § 1681n means to act in deliberate violation of a known FCRA duty.

a. Section 1681s. Under § 1681s, the FTC "may commence a civil action" against any person "[i]n the event of a knowing violation, which constitutes a pattern or practice of violations of [FCRA]." 15 U.S.C. § 1681s(a)(2)(A). "In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation." *Id.* Congress thus required the FTC to prove a "knowing" violation of FCRA to recover even a modest civil penalty of $2,500. It is difficult to believe that Congress intended to allow a private party to recover both statutory and unlimited punitive damages by proving merely a *reckless* violation of FCRA, when the government agency charged with enforcing FCRA must prove a *knowing* violation. The most sensible understanding of the "willfully" requirement in § 1681n(a), read in light of § 1681s, is that it can be satisfied only by a showing of actual knowledge.

b. Section 1681q. Section 1681q provides that "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses" is subject to criminal fines and up to two years' imprisonment. 15 U.S.C. § 1681q. Section 1681r complements § 1681q in imposing criminal liability on "[a]ny officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information." *Id.* § 1681r. The term "willfully" in these provisions requires a showing that the defendant "'acted with knowledge that his conduct was unlawful.'" *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006) (quoting *Bryan*, 524 U.S. at 192). Under settled principles of statutory construction, the same meaning should be given to the word "willfully" in § 1681n. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted).

Congress's amendments to FCRA in 1996 confirm that the same *scienter* requirement applies under § 1681n. Prior to 1996, courts grappled with the question whether a violation of § 1681q could give rise to civil liability under § 1681n or § 1681*o* – a question raised because there was no specific provision (other than § 1681q) restricting users of consumer information from obtaining reports for an impermissible purpose as defined by § 1681b. The courts generally answered the question in the affirmative, reasoning that the criminal prohibition was a "requirement" of FCRA upon which civil liability could be premised for "fail[ure] to comply." *E.g.*, *Hansen v. Morgan*, 582 F.2d 1214, 1219 (9th Cir. 1978). Several courts noted, however, that civil liability could be predicated only on § 1681n, not on § 1681*o*, because only a "willfulness"

requirement was consistent with § 1681q's "knowing and willful" *mens rea* standard.[6]

In the 1996 amendments to FCRA, Congress implicitly adopted the reasoning of these decisions by making a violation of § 1681q a basis for enhanced civil liability under § 1681n (governing "willful" violations), but *not* under § 1681*o* (governing "negligent" violations). *See* 15 U.S.C. § 1681n(a)(1)(B) (creating special damages for "willfully" "obtaining a consumer report under false pretenses or knowingly without a permissible purpose"). The clear implication of Congress's amendment is that § 1681n, but not § 1681*o*, is consistent with the mental state required under § 1681q, and thus that § 1681n alone "is the proper vehicle for civil liability for violations of Section 1681q." *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 368 n.1 (6th Cir. 1984). The 1996 amendments also bolster the conclusion that Congress viewed § 1681n as a fundamentally punitive measure to be interpreted *in pari materia* with § 1681q. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (punitive damages "serve the same purposes as criminal penalties"); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (describing punitive damages as "quasi-criminal"). Against this backdrop, acting "willfully" must

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[6] *See, e.g., Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 368-69 & n.1 (6th Cir. 1984) ("Since violation of Section 1681q occurs only when an individual acts knowingly and willfully, Section 1681n rather than Section 1681*o* is the proper vehicle for civil liability for violations of Section 1681q."); *Rice v. Montgomery Ward & Co.*, 450 F. Supp. 668, 671 (M.D.N.C. 1978) ("[S]ince § 1681q requires the information to have been knowingly and willfully obtained under false pretenses, a person may be held civilly liable pursuant only to § 1681n which covers willful failure to comply with the FCRA and not under § 1681*o* which pertains to negligent noncompliance with the FCRA."); *Graziano v. TRW, Inc.*, 877 F. Supp. 53, 56 n.5 (D. Mass. 1995) (calling a negligent violation of a statute requiring willfulness "a logical impossibility"); *Letscher v. Swiss Bank Corp.*, Civ. No. 94-8277, 1996 WL 183019, at *6 (S.D.N.Y. Apr. 16, 1996) (same); *accord Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 47 n.7 (2d Cir. 1997) (citing *Kennedy* with approval as "correctly" decided).

mean acting with knowledge that one's conduct violates the law — the same mental state needed to support a criminal conviction under § 1681q.

B. The Drafting History of § 1681n Demonstrates That "Willfully" Means More Than "With Reckless Disregard"

In addition to FCRA's plain language, the statute's drafting history evinces Congress's intent to require proof of a defendant's voluntary act in the face of a known legal duty before statutory and punitive damages may be awarded. *See, e.g., Doe v. Chao*, 540 U.S. 614, 622 (2004) (relying on the drafting history of the Privacy Act of 1974 to hold that plaintiffs must show actual damages in order to recover); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 302-03 (2002) (Thomas, J., joined by Rehnquist, C.J., & Scalia, J., dissenting) (relying on prior versions of the Equal Employment Opportunity Act of 1972 to interpret the EEOC's authority to seek victim-specific relief against private employers). While the drafting history of the ADEA may have supported a "reckless disregard" standard, *see Thurston*, 469 U.S. at 125-26, the drafting history of FCRA clearly does not.

FCRA provides for actual, statutory, and punitive damages for "willful" violations, *see* 15 U.S.C. § 1681n, and actual damages alone for "negligent" violations, *see id.* § 1681o. In the original Senate bill that became FCRA, however, recovery of even actual damages under what became § 1681o required a showing of "gross[] negligen[ce]." *See* S. 823, 91st Cong. § 617 (1969), *reprinted at* 116 Cong. Rec. 32,641 (Sept. 18, 1970).[7] The term "gross negligence" was understood at the time of FCRA's passage to be synonymous with "reckless disregard." *See, e.g., Restatement (Second) of Torts* § 282 cmt. e (1965) (stating that the phrase "gross negligence" in statutes is usually construed

[7] Senate bill 823 was passed by the Senate as part of a broader Senate banking bill, S. 3678, 91st Cong. (1970). *See* 116 Cong. Rec. 32,638-39 (Sept. 18, 1970) (statement of Sen. Proxmire).

to mean "reckless disregard"); *Black's Law Dictionary* 1185-86 (4th ed. 1968) ("Words 'gross negligence,' are equivalent to words 'reckless and wanton.'"). Thus, the original Senate bill's "willfulness" standard must have required a higher degree of intentionality than gross negligence or reckless disregard — namely, a deliberate violation of a known legal duty.

In the Conference Committee, the conferees ultimately adopted a House amendment to the Senate bill reducing from gross negligence to ordinary negligence the standard for actual damages under what became § 1681*o*. *See* H.R. Conf. Rep. No. 91-1587, at 30 (1970), *reprinted at* 1970 U.S.C.C.A.N. 4411, 4416 ("The House amendment to section 617, which was agreed to by the conferees, would establish liability for actual damages sustained as a result of ordinary negligence, instead of only as a result of gross negligence as provided in the Senate bill."). The Conference Committee, however, left intact the "willfulness" prerequisite for statutory and punitive damages, without reducing the required *scienter* to "recklessness" or "gross negligence." *See id.*

This was by no means an oversight. The House had before it alternative bills that would have expressly allowed statutory and punitive damages for either "grossly negligent or willful" violations. *See* H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970). These alternatives were never adopted by the House, nor were they proposed by the House conferees as amendments to the Senate bill, much less accepted by the Conference Committee as part of the final legislation. Thus, the House agreed with, and enacted into law, the meaning of "willfully" as it stood in the original Senate bill, which required proof that the defendant acted in knowing violation of the law.

C. Twenty Years of Settled Judicial Interpretation of § 1681n Requiring Actual Knowledge Confirms Congress's Intent

Consistent with the text, history, and structure of FCRA, eight circuit courts of appeals have consistently held, for more than 20 years, that "willfully" in § 1681n means "knowingly and intentionally" committing an act in "conscious" or "deliberate and purposeful" disregard of FCRA's requirements. In construing a similar statutory "willfulness" requirement in *Ratzlaf*, this Court "count[ed] it significant that [18 U.S.C.] § 5322(a)'s omnibus 'willfulness' requirement . . . consistently has been read by the Courts of Appeals to require both 'knowledge of the reporting requirement' *and* a 'specific intent to commit the crime,' *i.e.*, 'a purpose to disobey the law.'" 510 U.S. at 141 (quoting circuit court cases). Likewise, the long line of court of appeals decisions consistently construing "willfully" in § 1681n to require a showing of actual knowledge reinforces both the correctness of that interpretation and the error of the Ninth Circuit's contrary view.

Starting as early as the Sixth Circuit's decision in *Kennedy v. Border City Savings & Loan Association*, and continuing until the decision below, the courts of appeals were unanimous in their understanding of § 1681n's willfulness requirement. The Fifth Circuit's statement of the rule is typical: to be liable under § 1681n, a defendant must have "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986). Numerous decisions to the same effect are listed in the footnote.[8]

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[8] *See Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (per curiam); *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 972 (4th Cir. 1987); *Stevenson v. TRW Inc.*, 987 F.2d 288, 293 (5th Cir. 1993); *Arriola v. Safeco*, No. 92-35321, 1993 WL 530480 (9th Cir. Dec. 21, 1993) (judgment noted at 15 F.3d 1082); *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998); *Cousin v. Trans Union*

As the Eighth Circuit explained in *Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. 2002), "[u]nder this formulation the defendant must commit the act that violates [FCRA] with knowledge that he is committing the act and with intent to do so, and he must also be conscious that his act impinges on the rights of others." *Id.* at 368. "Reckless disregard" is not enough. *See id.* at 369 (expressly rejecting that standard); *accord Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) ("To act willfully, a defendant must knowingly and intentionally violate the Act, and it 'must also be conscious that [its] act impinges on the rights of others.'") (quoting *Phillips*, 312 F.3d at 368) (alteration in original); *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005) (quoting *Wantz*); *Bagby v. Experian Info. Solutions, Inc.*, 162 F. App'x 600, 605 (7th Cir. 2006) (same); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (holding that, under § 1681n, a defendant must act "knowingly and willfully").

Indeed, whenever these courts have applied the *mens rea* requirement of § 1681n to the facts of a particular case, they have consistently inquired whether there was evidence showing that the defendant knew that his conduct violated the law.[9] Consistent with these precedents,

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Corp., 246 F.3d 359, 372 (5th Cir. 2001); *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Northrop v. Hoffman of Simsbury, Inc.*, 12 F. App'x 44, 50 (2d Cir. 2001); *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 753 (5th Cir. 2002); *Phillips v. Grendahl*, 312 F.3d 357, 368 (8th Cir. 2002); *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005); *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 364 (6th Cir. 2005); *Bagby v. Experian Info. Solutions, Inc.*, 162 F. App'x 600, 605 (7th Cir. 2006). *See also* Pet. 14-19.

[9] *See, e.g., Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995) (rejecting plaintiffs' Rule 60(b) motion because proffered evidence "does not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA") (citing *Pinner*, 805 F.2d at 1263);

a prominent treatise on model federal jury instructions states that, under FCRA, "[t]he term 'willfully' means an omission or failure to do an act voluntarily and intentionally, and with specific intent to fail to do something the law requires to be done, in other words, with a purpose either to disobey or disregard the law." 3A Kevin F. O'Malley *et al.*, *Federal Jury Practice & Instructions* § 153.39 (5th ed. 2000); *accord id.* § 153.71 (same formulation in jury instructions for punitive damages under FCRA).

This unanimous appellate precedent and the resulting lower-court practice is particularly significant because, after these decisions had made clear that willful violations require actual knowledge, Congress overhauled FCRA several times without making any change to the "willfully" standard in § 1681n. By 1996, when Congress passed the CCRRA and specifically amended § 1681n, among other FCRA provisions, four circuits had already interpreted the "willfully" standard in § 1681n to require proof of a knowing violation. *See Pinner v. Schmidt*, 805 F.2d 1258 (5th Cir. 1986); *Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368 (10th Cir. 1987) (per curiam); *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967 (4th Cir. 1987); *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469 (2d Cir. 1995). Moreover, after the 1996 CCRRA, Congress revised the substantive requirements of FCRA without altering what by then was the unanimous opinion of eight circuits that actual knowledge is required to find a "willful" violation of FCRA. *See* Fair and Accurate Credit Transactions Act of

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Yohay, 827 F.2d at 972 & n.8 (upholding jury's verdict for plaintiff under § 1681n only after finding "considerable evidence" that defendant credit union "consciously ignored" plaintiff's rights because its manager "acted purposefully and with full knowledge of what she was doing"); *Zamora*, 811 F.2d at 1370-71 (affirming jury verdict of willful violation under § 1681n because trial testimony indicated that bank employees "knew the permissible purposes for obtaining consumer reports" and "knew they could not access the records of a spouse when checking the credit of an individual").

2003, Pub. L. No. 108-159, § 312(f), 117 Stat. 1952, 1993; *see also* Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347, 112 Stat. 3208. Congress is presumed to know of such judicial interpretations when it amends a statute and to implicitly endorse consistent interpretations of language that it declines to change. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 391 n.92 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

The history of judicial interpretation of FCRA stands in stark contrast to that of the ADEA and the FLSA, which this Court relied on in adopting a different standard for "willful" conduct in *Thurston*. *Thurston* relied heavily on the fact that the ADEA was modeled on the FLSA, which the circuit courts had consistently interpreted to provide for liability if the employer "knew *or showed reckless disregard*" for whether his conduct was prohibited. *See Thurston*, 469 U.S. at 126 (citing *Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir. 1951)) (internal quotation marks omitted; emphasis added). In fact, the state of circuit court precedent was exactly the *opposite* of what this Court confronts here: when this Court decided *Thurston*, only one circuit had held that the FLSA's liquidated-damages provision required a showing of deliberate or intentional conduct. *See id.* at 126 & n.19; *see also Hazen Paper*, 507 U.S. at 614 (noting "accepted judicial interpretation of [the FLSA] at the time of the passage of the ADEA supported the 'knowledge or reckless disregard' standard"). Here, the Ninth Circuit's decision stands alone in adopting "reckless disregard" as the proper measure of intent for FCRA.[10]

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[10] The Ninth Circuit purported to follow the Third Circuit's decision in *Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997). *See* Pet. App. 104a. In that case, the Third Circuit panel reiterated the court's prior holding in *Philbin* (*see supra* note 8) that willful noncompliance requires that a defendant "'knowingly and intentionally committed an act in *conscious* disregard for the rights of others,'" 115 F.3d at 226 (quoting *Philbin*, 101 F.3d at 970) (emphasis added), but it then

In unreflectively reading into FCRA the *Thurston* standard for willfulness under the FLSA and the ADEA, the Ninth Circuit failed to give any weight to the text and history of FCRA, or to the consistent judicial interpretations of its willfulness requirement. The Ninth Circuit's reasoning in this regard is at odds with this Court's repeated warnings against mechanically transferring the meaning of the term "willfully" from one statute to a different statutory context. *See Ratzlaf*, 510 U.S. at 141 (courts should interpret provisions requiring "willfulness" "mindful of the complex of provisions in which they are embedded"); *Murdock*, 290 U.S. at 395 (the term "willful" must be interpreted in the context of the statute's other provisions); *accord Spies*, 317 U.S. at 497; *Screws v. United States*, 325 U.S. 91, 101 (1945) (plurality opinion). Properly understood, all indications from the text, history, structure, and consistent judicial interpretation of FCRA are that Congress intended to require actual knowledge under § 1681n as a gateway to the extraordinary sanction of statutory and punitive damages, especially given the absence of any need to show actual harm.

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proceeded to state, without elaboration and without expressing any intention to abandon its holding in *Philbin*, that Trans Union could be liable for punitive damages under § 1681n if it acted "knowing [its actions] to be in contravention of the rights possessed by consumers pursuant to FCRA or in *reckless* disregard of whether" its actions were lawful, *id.* at 227 (emphasis added). It is doubtful that the *Cushman* panel intended, without any explanation, to depart materially from the "knowing violation" standard announced in *Philbin*, the very case on which the *Cushman* panel relied. *See United States v. Parker*, 462 F.3d 273, 277 n.4 (3d Cir.) ("[N]o subsequent panel overrules the holding in a precedential opinion of a previous panel.") (internal quotation marks omitted), *cert. denied*, No. 06-6568 (U.S. Oct. 16, 2006). Despite *Cushman*'s passing reference to "reckless disregard," therefore, it appears that *Philbin* continues to reflect the law of the Third Circuit.

D. An Actual-Knowledge Standard Furthers the Purposes of FCRA's Two-Tiered Remedial Scheme

In addition to believing erroneously that the "reckless disregard" standard "best comports with Supreme Court precedent," Pet. App. 127a, the Ninth Circuit reasoned that a "reckless disregard" standard "best furthers the purposes and objectives of [FCRA]," *id.* at 128a. In reality, however, the actual-knowledge standard is more consistent with the two-tiered liability structure established by Congress.

In the opening section of FCRA, Congress made clear that the Act was intended to require that "consumer reporting agencies adopt *reasonable* procedures" for ensuring the accuracy of consumer reports. 15 U.S.C. § 1681(b) (emphasis added). Similarly, the law requires users of consumer information to adopt reasonable procedures to ensure compliance with FCRA. *Id.* § 1681m(c) ("No person shall be held liable for any violation of [§ 1681m] if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section."). Congress thus sought to preserve a balance between protection of consumer privacy and the legitimate need of American companies to rely on consumer credit information in assessing risk and making business judgments. *See, e.g., Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045-46 (7th Cir. 2005) (noting Congress's desire to strike a "balance between consumer privacy and the needs of a modern, credit-driven economy"). To create incentives for businesses to "adopt reasonable procedures," Congress enacted § 1681*o*, which, in imposing an ordinary negligence standard, effectively requires those subject to FCRA's substantive provisions to take "reasonable" care. *See generally Restatement (Second) of Torts* § 282 (defining negligence as failure to exercise reasonable care). Congress also provided those injured by any negligent failure to "adopt reasonable procedures"

with adequate incentive to file suit, by permitting recovery not only of actual damages, but also of court costs and reasonable attorney's fees. *See* 15 U.S.C. § 1681*o*. Section 1681*o* thus satisfies Congress's basic goal of compensating injured parties for lapses under the Act.

In contrast, § 1681n has a punitive purpose, in its provision of both statutory damages of from $100 up to $1,000 and, in addition, potentially unlimited punitive damages — all regardless of any actual damages.[11] Under the Ninth Circuit's rule, § 1681n imposes those extraordinary penalties not just on true malefactors that knowingly violate established law, but also on companies that simply guess wrong about how courts will ultimately construe technical requirements of the statute that have yet to be the subject of judicial interpretation. If that were the law, companies in Safeco's position would have no choice but to conform their conduct to the most expansive possible interpretation of FCRA's requirements, resulting in enormous compliance costs and the curtailment of legitimate business activities, even where that expansive interpretation is unlikely to be correct. Otherwise, companies would risk facing potentially enormous statutory damages, attorney's fees, and costs, as well as possible punitive damages. Limiting recovery of these extraordinary damages to intentional violations is thus consonant with the policies behind FCRA because it ensures that these remedies will not chill legitimate business conduct by forcing businesses to adopt *unreasonable* compliance measures in the face of legal uncertainty regarding FCRA's substantive requirements.

This concern is particularly acute in the context of FCRA, which does not limit the amount of damages (actual, statutory, or punitive) that can be recovered in a

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[11] Courts have held that actual damages are not a prerequisite to recovery of punitive damages under § 1681n. *See, e.g., Yohay*, 827 F.2d at 972.

consumer class action.[12] Given the frequency with which credit information is commercially used, and § 1681n's $1,000-per-occurrence statutory-damages provision, the potential exposure of American business, and the windfall to plaintiffs' lawyers, is astronomical — even in the absence of any actual injury to the class-action plaintiffs these lawyers claim to represent. Contrary to the Ninth Circuit's reasoning, a "reckless disregard" standard thus undercuts, rather than effectuates, the two-tiered liability structure enacted by Congress.[13]

Imposing a more lax "reckless disregard" standard for punitive damages is also particularly inappropriate given the highly technical nature of FCRA. *Cf. Ratzlaf*, 510 U.S. at 144. Punitive damages should be reserved for cases of highly "reprehensible" conduct in which the defendant engages in conduct intending or carrying a high risk of harm — especially harm to physical health or safety. *See, e.g., State Farm*, 538 U.S. at 419 (relevant

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[12] FCRA is thus unlike other federal consumer credit provisions, such as the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B), and the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b), which do impose such caps.

[13] The Ninth Circuit's view that "willfully" has a categorically different meaning in civil than in criminal statutes (*see* Pet. App. 127a-128a) is overly simplistic because, as this Court has repeatedly recognized, civil punitive-damages provisions have penal characteristics. This Court has never had occasion to address the definition of "willfully" in a statute providing for punitive damages. Although *Thurston* in passing described the double-damages provision of the FLSA (incorporated into the ADEA) as "punitive in nature," 469 U.S. at 125, this Court had previously stated that those damages are "compensation, not a penalty or punishment by the Government," designed to adjust for the delay in recovery. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-16 (1945). At any rate, this Court has also recognized that, even to the extent that damage multipliers such as those contained in the ADEA and the FLSA may be "'punitive' in that recovery will exceed full compensation in a good many cases," they "certainly do not equate with classic punitive damages, which leave the jury with open-ended discretion over the amount." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 131-32 (2003).

factors include whether "the harm caused was physical as opposed to economic" and whether the conduct risked compromising "the health or safety of others").

The conduct regulated by FCRA has none of these attributes of reprehensibility. As illustrated by the allegations in the complaint in this case, plaintiffs do not allege or seek *any* actual damages — nor do they claim to have suffered any non-economic harm. They do not even claim — on behalf of themselves or the class they purport to represent — that their credit information was inaccurate, nor that Safeco used their information for an unlawful purpose or in an unlawful manner. Their claim is based *purely* on an alleged failure to comply with a technical, prophylactic notice requirement that no court had ever previously interpreted in the manner the Ninth Circuit has now read it. In light of Congress's desire to balance consumer protection with legitimate business use of credit information, it is implausible that Congress intended to subject defendants to enormous statutory and punitive damages for a mere "reckless" failure to comply with FCRA's technical requirements absent true indications of reprehensibility in the form of deliberate, intentional conduct.

E. Any Residual Doubt About the Proper Interpretation of "Willfully" Should Be Resolved in Favor of an Actual-Knowledge Standard Under the Rule of Lenity

Finally, if there remains any doubt as to the meaning of "willfully" after resort to the text, history, and structure of FCRA, it should be resolved in favor of a higher *scienter* requirement under the rule of lenity. Under that rule, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see also Busic v. United States*, 446 U.S. 398, 406 (1980) (applying "the oft-cited rule that ambiguity concerning the ambit of criminal statutes should be

resolved in favor of lenity") (internal quotation marks omitted).

The rule of lenity should apply equally to a provision, such as § 1681n, providing for punitive damages — which this Court has recognized share similar characteristics to criminal sanctions. *See supra* p. 24; *see also Gore*, 517 U.S. at 583 (holding that "civil or criminal penalties that could be imposed for comparable misconduct" are a benchmark for the potential excessiveness of punitive damages). Indeed, in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court found the similarities between punitive damages and criminal sanctions so significant that it invoked the heightened presumption against statutory retroactivity applicable to criminal laws in refusing to give retrospective effect to the punitive-damages provision contained in § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. *See* 511 U.S. at 281 (Punitive and exemplary damages "share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question [under the Ex Post Facto Clause].").

Like the presumption against retroactivity, the rule of lenity is an established doctrine, founded on policies that "have long been part of our tradition": an insistence that defendants be given fair warning of what conduct is prohibited and a requirement that penal provisions — which "represent[] the moral condemnation of the community" — must be defined by legislatures, not courts. *United States v. Bass*, 404 U.S. 336, 348 (1971). Here, any doubt about the meaning of "willfully" in § 1681n should be resolved in favor of an actual-knowledge requirement. *See also* 3 Norman J. Singer, *Sutherland Statutory Construction* §§ 59.2, 59.3 (6th ed. 2001) (stating that statutory canons such as the rule of lenity should apply to all statutes that are "penal," including not only criminal provisions but also those providing for exemplary or punitive damages).

F. Under an Actual-Knowledge Standard, Summary Judgment for Safeco Was Proper

Under an actual-knowledge standard, the district court's summary judgment for Safeco was undoubtedly proper, and should have been affirmed, because "adverse action" under FCRA had *never* been interpreted by any court or the FTC to apply to initial policies of insurance.[14] As the Fifth Circuit held in *Stevenson v. TRW Inc.*, 987 F.2d 288 (5th Cir. 1993), another FCRA case, because "[t]here was no prior guidance to suggest that [the defendant's] notice was insufficient," the court "[could]not conclude that [it] knowingly and intentionally obscured the notice in conscious disregard of consumers' rights." *Id.* at 296.

II. THE NINTH CIRCUIT'S EXTREME INTERPRETATION OF THE TERM "WILLFULLY" MUST BE REJECTED

Even if this Court were to conclude that "willful" violations of FCRA can include some actions taken without knowledge that one was violating the law, it should reject the Ninth Circuit's extreme version of "reckless disregard," which would expose to unlimited punitive-damages

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[14] In the court of appeals, respondents cited a single FTC informal opinion letter, in which the FTC staff stated their belief that an "adverse action" occurs if an insurance "applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report had been more favorable," but that letter by its own terms warned that it was "not binding on the Commission." Letter from Hannah A. Stires to James M. Ball (Mar. 1, 2000), *available at* http://www.ftc.gov/os/statutes/fcra/ball.htm. Respondents also cited the FTC's Prescribed Notice of User Responsibilities, which states that an "adverse action" is, generically speaking, an action that has a "negative impact" on a consumer. 16 C.F.R. Pt. 601, App. C (§ I.C). The specific examples of "adverse actions" conspicuously do *not* include the "best rate" scenario, instead referring to "unfavorably changing credit or contract terms or conditions, denying or canceling credit or insurance, offering credit on less favorable terms than requested, or denying employment or promotion." *Id.*

liability those whose actions are based on a legally defensible (even if ultimately incorrect) reading of the statute.

A. A Legally Defensible Statutory Interpretation Cannot Be Deemed "Willful" Even Under a "Recklessness" Standard

Any appropriate understanding of the term "willfully" under FCRA must exclude actions taken based on an interpretation of the law that is legally defensible. Conduct based on an objectively reasonable view of the law cannot even be *negligent*; much less can it entail an "unjustifiably high risk" of unlawful conduct needed to support a finding of "willfulness" even under a recklessness standard. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (defining recklessness) (citing *Prosser and Keeton on the Law of Torts* § 34, at 213-14 (5th ed. 1984); *Restatement (Second) of Torts* § 500). This analysis applies with special force in the context of a highly technical statutory scheme like FCRA. There is simply no basis to believe that Congress, which intended to balance the legitimate interests of businesses and consumers, would have intended to subject companies to billions of dollars in potential liability for punitive and statutory damages simply because they did not accurately predict whether courts would ultimately uphold a colorable, even if not ultimately persuasive, reading of a technical provision of the statute involving, in this instance, whether certain notices must be provided. Thus, at the least, to be reckless, a legal interpretation must be more than unreasonable (*i.e.*, negligent); it must be objectively baseless.

The Ninth Circuit's understanding of "willfully," as applied in this case, lacks even this minimum protection. Safeco's legal position in the district court and the Ninth Circuit was premised on an interpretation of "adverse action" that, at the very least, is supported by a plausible understanding of the plain language and statutory purposes of FCRA. In particular, "adverse action" for insurance purposes is defined in FCRA as "a denial or cancellation of, an increase in any charge for, or a reduction or

other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). The dictionary definition of the term "increase" is to "make something greater," and the definition of the term "charge" is the "price demanded for goods or services." Pet. App. 114a-115a.

The most straightforward interpretation of the phrase "increase in any charge" is an increase in an actual, existing premium. One does not make any "charge" greater if there is no "charge" being imposed in the first place. While the word "any" may be read to encompass all *types* of charges associated with insurance, it stretches the meaning of that word beyond the breaking point to read it to include *nonexistent*, *hypothetical* charges. At the very least, therefore, Safeco had a legitimate basis for contending, as the district court ultimately held, that there can be no "increase in any charge" unless there is a preexisting charge to increase. *See id.* at 11a-12a.

Beyond ordinary language, there are strong policy and pragmatic considerations supporting the reasonableness of Safeco's interpretation and cutting against the Ninth Circuit's position that notice is self-evidently required where an initial charge may be greater than some hypothetical charge. The Ninth Circuit's "best rate" policy dilutes Congress's "adverse action" notice requirement by making such a notice necessary in the vast majority of insurance applications. Very few policyholders — less than 15%, by one estimate — receive the absolute "best rate" when they apply for a new insurance policy. *See* Brief for the Financial Services Roundtable as *Amicus Curiae* in Support of Petitioners at 8 (filed Aug. 21, 2006) ("Roundtable *Amicus* Br."). Given the number of new policies that are issued (more than 150 million since 2001, *see* Pet. 24), the effect of the Ninth Circuit's decision will be that tens of millions of notices will be sent to consumers each year, including to consumers who received *better* rates due to their good credit scores than they would have received

had the insurer used *no* credit information in setting premiums, even though they did not get the absolute best rate that a Platonic "ideal score" might have yielded. *See* Brief for Petitioners at Part I.C, *GEICO Gen. Ins. Co., et al. v. Edo*, No. 06-100 (filed Nov. 13, 2006); *see* Pet. App. 118a (requiring notice "whenever a consumer pays a higher rate because his credit rating is less than the top potential score").

The FTC cautioned Congress against this absurd outcome when it warned in 2003 of the need "'to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate.'" Roundtable *Amicus* Br. at 9 (quoting testimony of Joel Winston, Associate Director, FTC Bureau of Consumer Protection, to the Senate Committee on Banking, Housing, and Urban Affairs). Sending out more notices (and causing more "false alarms") actually *undermines* Congress's objectives because it generates significant consumer confusion. Moreover, as the FTC warned, "'[i]f you give notices too widely and in too many circumstances, then it . . . becomes something that people ignore.'" *Id.* (quoting testimony of J. Howard Beales, III, Director, FTC Bureau of Consumer Protection, to the Senate Committee on Banking, Housing, and Urban Affairs) (ellipsis in original).

The Ninth Circuit thought it significant that the statutory definition of "adverse action" refers to insurance "existing or applied for," but that phrase at most highlights a potential ambiguity in the statute; it does not resolve the ambiguity. Most of the actions described in § 1681a(k)(1)(B)(i) make sense only in the context of *either* "existing" *or* "applied for" insurance, but not both. For instance, "cancellation" has no meaning outside of "existing" policies; one cannot cancel a policy that has only been applied for. "Denial" occurs only in the context of policies that a consumer has "applied for"; one does not "deny" an existing policy, though one might well "cancel" it. With respect to the "increase in any charge" prong of "adverse

action," the most natural reading is that it applies only to *actual* charges, not hypothetical ones, and thus no such "increase" occurs outside the context of "existing" insurance. Even if there were an ambiguity, however, the phrase "existing or applied for" would not resolve it: given that both words of that phrase clearly do not modify all of the various forms of "adverse action," it remains unclear whether Congress intended an "increase in any charge" to be modified by both "existing" and "applied for," or only the former.

Significantly, the Ninth Circuit need not have resolved any ambiguity in FCRA's definition of 'adverse action" (and this Court need not either) to conclude that the district court's grant of summary judgment should have been affirmed. Safeco's interpretation is not an objectively baseless reading of the plain language of the statute, and it comports with the policies of Congress in enacting FCRA. Moreover, prior to the decision below, the only judicial decisions to address the question — the district court's decisions in *Mark* and the case below — agreed with Safeco's reading, finding it not only reasonable but compelled by the plain text of the statute. In these circumstances, courts have routinely rejected a finding of willfulness as a matter of law even under the *Thurston* recklessness standard adopted (erroneously) by the Ninth Circuit.[15] The Ninth Circuit should therefore

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[15] *See, e.g., Reich v. Gateway Press, Inc.*, 13 F.3d 685, 702-03 (3d Cir. 1994) (willfulness could not be sustained partly because the case presented an issue of first impression, and the defendants did not violate "settled FLSA doctrine"); *Hoai v. Sun Ref. & Mktg. Co.*, Civ. A. No. 87-2456-LFO, 1991 WL 242116 (D.D.C. Oct. 28, 1991) (Oberdorfer, J.) (holding that there can be no willful violation under even a *Thurston* "reckless disregard" standard in the case of close questions of statutory interpretation absent developed case law) (citing cases), *aff'd mem.*, 18 F.3d 953 (D.C. Cir. 1994) (per curiam) (table); *cf. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (to be considered a "sham" under the *Noerr-Pennington* antitrust immunity doctrine, litigation position must be "objectively baseless in the sense that no reasonable litigant could realistically expect

have affirmed summary judgment for Safeco rather than remanding for an investigation into Safeco's subjective good faith in adopting its interpretation of FCRA.

B. The Intrusive Inquiry Authorized by the Ninth Circuit Into Safeco's Decision-Making Processes Is Unwarranted

The Ninth Circuit also erred in concluding that reliance on advice of counsel is not a shield against the conclusion that an insurer acted "willfully" and could be subject to potentially billions of dollars in damages for violating a statutory provision that no court had ever concluded was contrary to the insurers' understanding. According to the Ninth Circuit, "consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive." Pet. App. 129a. The court of appeals thus instructed that the district court hear "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* Under that standard, companies will be required to waive the attorney-client privilege and disclose the manner in which company lawyers came to their legal judgments, as well as the manner in which those legal judgments were communicated to and relied upon by the company's business decision-makers. *See id.* Moreover, even good-faith reliance on lawyers' legal advice may not be sufficient to avoid liability if a court later determines that the legal position taken by the company is "implausible," because, under the Ninth Circuit's extraordinary reasoning, there is a purported need to prevent companies from "employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 128a-129a.

This Court has never authorized such an invasive inquiry into lawyers' work product or their relationships with their clients. On the contrary, even in the very

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success on the merits"; "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation").

different context of the ADEA, this Court concluded that a company's actions could not have been willful *as a matter of law* where it "sought legal advice," even though the attorneys "overlooked" the key issue and consequently enacted a policy that clearly violated the ADEA. *Thurston*, 469 U.S. at 130; *see id.* at 124-25, 129 (company acted "reasonably and in good faith" where it consulted with lawyers to determine lawfulness of existing policy even though its legal position was "meritless"). Similarly, in *Ratzlaf*, this Court held that a "willful" violation of the federal anti-structuring laws "might be negated by, *e.g.*, proof that defendant relied in good faith on advice of counsel." 510 U.S. at 142 n.10.

The Ninth Circuit's refusal to recognize a complete advice-of-counsel defense under § 1681n rests on a presumption of bad faith on the part of both lawyers and clients that is unprecedented in the decisions of this Court and unwarranted as a matter of principle and policy. This Court has recognized that, "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (internal quotation marks omitted). The need to consult with counsel is especially pressing where, as with FCRA, the definition of lawful conduct is "hardly an instinctive matter." *Id.*

The Ninth Circuit's view that a company's reliance on the legal advice of their corporate counsel should not be "dispositive" because such counsel might be compromised by the company's "deliberate purpose of obtaining" "creative but unlikely" legal opinions, Pet. App. 128a-129a, is at odds with this Court's recognition of the "valuable" role that counsel play "to ensure their client's compliance with the law," *Upjohn*, 449 U.S. at 392. Beyond that, it will lead to unnecessary and intrusive investigations into and discovery concerning privileged attorney-client discussions, all because the Ninth Circuit has concluded that an

insurer can "willfully" violate FCRA, and thus be subject to crushing statutory and punitive damages, even when it follows its attorneys' advice on a technical legal issue as to which no court has yet ruled. This Court should reject that understanding of the statute and reverse the Ninth Circuit decision.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for reinstatement of the judgments of the district court dismissing plaintiffs Burr's and Massey's claims.

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STATUTORY PROVISIONS INVOLVED

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, provides in relevant part:

15 U.S.C. § 1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer Report. –

(1) In general. – The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for –

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) Exclusions. – Except as provided in paragraph (3), the term "consumer report" does not include –

(A) subject to section 1681s-3 of this title, any –

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (o) or (x) of this section.

(3) Restriction on sharing of medical information. – Except for information or any communication of information disclosed as provided in section 1681b(g)(3) of this title, the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is –

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) Medical Information. – The term "medical information" –

(1) means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to –

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the payment for the provision of health care to an individual.

(2) does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(j) Definitions Relating to Child Support Obligations.

(1) Overdue support.

The term "overdue support" has the meaning given to such term in section 666(e) of title 42.

(2) State or local child support enforcement agency.

The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse Action. –

(1) Actions included. – The term "adverse action" –

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means –

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is –

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) Applicable findings, decisions, commentary, and orders. – For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

***(l)* Firm Offer of Credit or Insurance.** – The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established –

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification –

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was –

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) Credit or Insurance Transaction That Is Not Initiated by the Consumer. – The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of –

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) State. – The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(o) Excluded Communications. – A communication is described in this subsection if it is a communication –

(1) that, but for subsection (d)(2)(D) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of –

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and

(5) with respect to which –

(A) the consumer who is the subject of the communication –

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication –

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which anaction is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) Consumer Reporting Agency That Compiles and Maintains Files on Consumers on a Nationwide Basis. – The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nationwide:

(1) Public record information.

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

(q) Definitions Relating to Fraud Alerts –

(1) Active duty military consumer. – The term "active duty military consumer" means a consumer in military service who –

(A) is on active duty (as defined in section 101(d)(1) of title 10) or is a reservist performing duty under a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10; and

(B) is assigned to service away from the usual duty station of the consumer.

(2) Fraud alert; active duty alert. – The terms "fraud alert" and "active duty alert" mean a statement in the file of a consumer that –

(A) notifies all prospective users of a consumer report relating to the consumer that the consumer may be a victim of fraud, including identity theft, or is an active duty military consumer, as applicable; and

(B) is presented in a manner that facilitates a clear and conspicuous view of the statement described in subparagraph (A) by any person requesting such consumer report.

(3) Identity theft. – The term "identity theft" means a fraud committed using the identifying information of another person, subject to such further definition as the Commission may prescribe, by regulation.

(4) Identity theft report. – The term "identity theft report" has the meaning given that term by rule of the Commission, and means, at a minimum, a report –

(A) that alleges an identity theft;

(B) that is a copy of an official, valid report filed by a consumer with an appropriate Federal, State, or local law enforcement agency, including the United States Postal Inspection Service, or such other government agency deemed appropriate by the Commission; and

(C) the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information if, in fact, the information in the report is false.

(5) New credit plan. – The term "new credit plan" means a new account under an open end credit plan (as defined in section 1602(i) of this title) or a new credit transaction not under an open end credit plan.

(r) Credit and Debit Related Terms –

(1) Card issuer. – The term "card issuer" means –

(A) a credit card issuer, in the case of a credit card; and

(B) a debit card issuer, in the case of a debit card.

(2) Credit card. – The term "credit card" has the same meaning as in section 1602 of this title.

(3) Debit card. – The term "debit card" means any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of the consumer at such financial institution, for the purpose of transferring money between accounts or obtaining money, property, labor, or services.

(4) Account and electronic fund transfer. – The terms "account" and "electronic fund transfer" have the same meanings as in section 1693a of this title.

(5) Credit and creditor. – The terms "credit" and "creditor" have the same meanings as in section 1691a of this title.

(s) Federal Banking Agency. – The term "Federal banking agency" has the same meaning as in section 1813 of title 12.

(t) Financial Institution. – The term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 461(b) of title 12) belonging to a consumer.

(u) Reseller. – The term "reseller" means a consumer reporting agency that –

(1) assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and

(2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.

(v) Commission. – The term "Commission" means the Federal Trade Commission.

(w) Nationwide Specialty Consumer Reporting Agency. – The term "nationwide specialty consumer reporting agency" means a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to –

(1) medical records or payments;

(2) residential or tenant history;

(3) check writing history;

(4) employment history; or

(5) insurance claims.

(x) Exclusion of Certain Communications for Employee Investigations –

(1) Communications described in this subsection. – A communication is described in this subsection if –

(A) but for subsection (d)(2)(D) of this section, the communication would be a consumer report;

(B) the communication is made to an employer in connection with an investigation of –

(i) suspected misconduct relating to employment; or

(ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory

organization, or any preexisting written policies of the employer;

(C) the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and

(D) the communication is not provided to any person except –

(i) to the employer or an agent of the employer;

(ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;

(iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;

(iv) as otherwise required by law; or

(v) pursuant to section 1681f of this title.

(2) Subsequent disclosure. – After taking any adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) of this section an investigative consumer report need not be disclosed.

(3) Self-regulatory organization defined. – For purposes of this subsection, the term "self-regulatory organization" includes any self-regulatory organization (as defined in section 78c(a)(26) of this title), any entity established under title I of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7211 et seq.], any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with such Commission.

15 U.S.C. § 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall –

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically –

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right –

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies

(1) In general. – Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate. –

(A) Duties, generally. – If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall –

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described. – An action referred to in subparagraph (A) is an adverse action described in

section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1681a(k)(1)(B) of this title.

(C) Information described. – Information referred to in subparagraph (A) –

(i) except as provided in clause (ii), is information that –

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include –

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on basis of information contained in consumer files

(1) In general. – Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section

1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that –

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

(2) Disclosure of address and telephone number; format. – A statement under paragraph (1) shall –

(A) include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title; and

(B) be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration.

(3) Maintaining criteria on file. – A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected. – This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

(e) Red flag guidelines and regulations required

(1) Guidelines. – The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title –

(A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary;

(B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers

or to the safety and soundness of the institution or customers; and

(C) prescribe regulations applicable to card issuers to ensure that; if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures –

(i) notifies the cardholder of the request at the former address of the cardholder and provides to the cardholder a means of promptly reporting incorrect address changes;

(ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or

(iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(2) Criteria

(A) In general. – In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.

(B) Inactive accounts. – In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies

and procedures that provide for notice to be given to a consumer in a manner reasonably designed to reduce the likelihood of identity theft with respect to such account.

(3) Consistency with verification requirements. – Guidelines established pursuant to paragraph (1) shall not be inconsistent with the policies and procedures required under section 5318(l) of title 31.

(f) Prohibition on sale or transfer of debt caused by identity theft

(1) In general. – No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 1681c-2 of this title has resulted from identity theft.

(2) Applicability. – The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).

(3) Rule of construction. – Nothing in this subsection shall be construed to prohibit –

(A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;

(B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or

(C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.

(g) Debt collector communications concerning identity theft

If a person acting as a debt collector (as that term is defined in subchapter V of this chapter) on behalf of a third party that is a creditor or other user of a consumer report is notified that any information relating to a debt that the

person is attempting to collect may be fraudulent or may be the result of identity theft, that person shall –

(1) notify the third party that the information may be fraudulent or may be the result of identity theft; and

(2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.

(h) Duties of users in certain credit transactions

(1) In general. – Subject to rules prescribed as provided in paragraph (6), if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with this subsection.

(2) Timing. – The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).

(3) Exceptions. – No notice shall be required from a person under this subsection if –

(A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or

(B) the person has provided or will provide a notice to the consumer under subsection (a) of this section in connection with the transaction.

(4) Other notice not sufficient. – A person that is required to provide a notice under subsection (a) of this section cannot meet that requirement by providing a notice under this subsection.

(5) Content and delivery of notice. – A notice under this subsection shall, at a minimum –

(A) include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report;

(B) identify the consumer reporting agency furnishing the report;

(C) include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge; and

(D) include the contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in section 1681a(p) of this title).

(6) Rulemaking

(A) Rules required. – The Commission and the Board shall jointly prescribe rules.

(B) Content. – Rules required by subparagraph (A) shall address, but are not limited to –

(i) the form, content, time, and manner of delivery of any notice under this subsection;

(ii) clarification of the meaning of terms used in this subsection, including what credit terms are

material, and when credit terms are materially less favorable;

(iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;

(iv) a model notice that may be used to comply with this subsection; and

(v) the timing of the notice required under paragraph (1), including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.

(7) Compliance. – A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.

(8) Enforcement

(A) No civil actions. – Sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement. – This section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section.

15 U.S.C. § 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C. § 1681*o*. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C. § 1681q. Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under Title 18, imprisoned for not more than 2 years, or both.

15 U.S.C. § 1681r. Unauthorized disclosures by officers or employees

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under Title 18, imprisoned for not more than 2 years, or both.

15 U.S.C. § 1681s. Administrative enforcement

(a) Enforcement by Federal Trade Commission

(1) Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C. 45(a)] and shall be subject to enforcement by

the Federal Trade Commission under section 5(b) thereof [15 U.S.C. 45(b)] with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this subchapter.

(2)(A) In the event of a knowing violation, which constitutes a pattern or practice of violations of this subchapter, the Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this subchapter. In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation.

(B) In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(3) Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 1681s-2(a)(1) of this title unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and the court may not

impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.

(b) Enforcement by other agencies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of section 1681m of this title shall be enforced under –

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], in the case of –

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act [12 U.S.C. 1751 et seq.], by the Administrator of the National Credit Union

Administration with respect to any Federal credit union;

(4) subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part; and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State –

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover –

(i) damages for which the person is liable to such residents under sections 1681n and 1681o of this title as a result of the violation;

(ii) in the case of a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this

title, damages for which the person would, but for section 1681s-2(c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than $1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Federal regulators.

The State shall serve prior written notice of any action under paragraph (1) upon the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) of this section and provide the Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Federal Trade Commission or appropriate Federal regulator shall have the right –

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(3) Investigatory powers.

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation on State action while Federal action pending.

If the Federal Trade Commission or the appropriate Federal regulator has instituted a civil action or an administrative action under section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818] for a violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission or the appropriate Federal regulator for any violation of this subchapter that is alleged in that complaint.

(5) Limitations on State actions for certain violations

(A) Violation of injunction required

A State may not bring an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, unless –

(i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and

(ii) the person has violated the injunction.

(B) Limitation on damages recoverable

In an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, a State may not recover any damages incurred before the date of the violation of an injunction on which the action is based.

(d) Enforcement under other authority

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under

that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

(e) Regulatory authority

(1) The Federal banking agencies referred to in paragraphs (1) and (2) of subsection (b) of this section shall jointly prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraphs (1) and (2) of subsection (b) of this section, and the Board of Governors of the Federal Reserve System shall have authority to prescribe regulations consistent with such joint regulations with respect to bank holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies.

(2) The Board of the National Credit Union Administration shall prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraph (3) of subsection (b) of this section.

(f) Coordination of consumer complaint investigations

(1) In general

Each consumer reporting agency described in section 1681a(p) of this title shall develop and maintain procedures for the referral to each other such agency of any consumer complaint received by the agency alleging identity theft, or requesting a fraud alert under section 1681c-1 of this title or a block under section 1681c-2 of this title.

(2) Model form and procedure for reporting identity theft

The Commission, in consultation with the Federal banking agencies and the National Credit Union Admini-

stration, shall develop a model form and model procedures to be used by consumers who are victims of identity theft for contacting and informing creditors and consumer reporting agencies of the fraud.

(3) Annual summary reports

Each consumer reporting agency described in section 1681a(p) of this title shall submit an annual summary report to the Commission on consumer complaints received by the agency on identity theft or fraud alerts.

(g) FTC regulation of coding of trade names

If the Commission determines that a person described in paragraph (9) of section 1681s-2(a) of this title has not met the requirements of such paragraph, the Commission shall take action to ensure the person's compliance with such paragraph, which may include issuing model guidance or prescribing reasonable policies and procedures, as necessary to ensure that such person complies with such paragraph.

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FILED
DEC 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' JOINT BRIEF ON THE MERITS

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December 2006

QUESTIONS PRESENTED

1. Whether proof of "reckless disregard" of a defendant's obligations under the law is sufficient to establish a willful violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681n(a)(1)(A), as it is under similar federal civil statutes that incorporate a willfulness standard of liability.

2. Whether GEICO took an adverse action against respondent Ajene Edo within the meaning of FCRA, 15 U.S.C. 1681a(k), when it denied him insurance with one of its subsidiaries and issued him a more expensive policy from another affiliate based, in part, on consideration of his credit file.

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STATEMENT OF THE CASE

Following both the clear text of the Fair Credit Reporting Act ("FCRA") and over seventy years of Supreme Court precedent, the Ninth Circuit Court of Appeals held that a "willful" violation of a civil statute, 15 U.S.C. § 1681n(a), can be established by proof that a defendant violated the statute "either knowing that the action violates the rights of consumers or in reckless disregard of those rights[.]" GEICO Pet. App. 33a-34a.[1] That was the extent of the Ninth Circuit's holding on willfulness. The court did not apply its "knowing or reckless" standard to any factual record. It remanded the case for further proceedings and provided *dicta* to guide the district court's consideration of a complete factual record, particularly should defendants *choose* to raise an advice of counsel defense. GEICO Pet. App. 34a. That *dicta* is also consistent with this Court's case law defining willfulness.

No lower court has yet considered any factual record on the issue of willfulness in these cases. Petitioners originally moved for summary judgment on several grounds. Because the district court concluded that petitioners had not taken "adverse actions" under FCRA, it never reached their argument that no reasonable juror could conclude that they acted willfully. GEICO Pet. App. 44a-47a. Safeco Pet. App. 12a-14a, 22a n 5. The Ninth Circuit reversed the district court's substantive "adverse action" ruling, defined the appropriate standard for willfulness, and remanded. The petitions for certiorari presented the question whether the Ninth Circuit's

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[1] "GEICO Pet. App." refers to the appendix to the GEICO petition that contains the published Ninth Circuit opinion. The *Safeco* case was resolved by an unpublished memorandum opinion that incorporated the published Ninth Circuit Opinion in *GEICO*. Safeco Pet. App. 2a. Except where specifically noted, "GEICO" refers to all of the GEICO respondents, including the lead company Government Employees Insurance Co., which employs all GEICO employees. "Safeco" refers to the lead respondent Safeco Insurance Company of America, which employs all Safeco employees, and the affiliated Safeco companies that are also respondents.

willfulness standard was correct, but did not ask this Court to apply the standard to the facts. GEICO Pet. i; Safeco Pet. i. Nonetheless, petitioners now not only ask this Court to adopt a legal standard that contradicts the statute and the Court's case law, they also ask the Court to find that they cannot be liable *as a matter of law* based solely on their legal arguments, without review by any court of the facts concerning their state of mind when they violated the statute. This attempt to bypass all factual review, including an initial review by the district court of the summary judgment record, is particularly inappropriate because willfulness is an issue of intent properly left to a fact-finder, typically the jury.

The Ninth Circuit also concluded, again based on the clear text of FCRA and the undisputed facts, that GEICO customer Ajene Edo suffered an "adverse action" under 15 U.S.C. § 1681a(k)(1)(B)(i) when GEICO, based in part on a review of Edo's credit information, *denied* him insurance with the preferred and *lower cost* insurer GEICO General and *increased* his premiums by issuing him a more expensive policy with GEICO Indemnity. GEICO Pet. App. 20a-21a, 36a. GEICO's contention that the Ninth Circuit held that Edo was adversely treated "even when his credit score had no effect on premiums," GEICO Br. 1, misstates the Ninth Circuit's opinion and is directly contradicted by the factual record. It is undisputed that GEICO *denied* Edo insurance with one of its subsidiaries and *increased* his premiums by placing him in a more expensive affiliated company based in part on its review of *his* actual credit information. GEICO JA 80.

The Fair Credit Reporting Act. FCRA was enacted to regulate three interrelated groups: (1) consumer reporting agencies, which collect confidential consumer information, (2) suppliers of information to consumer reporting agencies, and (3) users of consumer information, such as GEICO and Safeco, that use this confidential information in business transactions with consumers. 15 U.S.C. § 1681 *et seq.*

With respect to users of consumer or credit information, FCRA is a straightforward notice statute. If users of con-

sumer information, here insurance companies, use credit information in connection with a consumer transaction, they must give notice when they take an "adverse action" against the consumer based, at least in part, on his credit information. 15 U.S.C. §§ 1681m; 1681a(k)(1). An adverse action includes "a denial or cancellation of, [or] an increase in any charge for . . . any insurance existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). Thus, if an insurance company denies a consumer insurance or increases a charge for insurance in connection with its underwriting process (*whether for a new or existing customer*) "based in whole or part on any information contained in a consumer report," the insurer must give the consumer notice. 15 U.S.C. § 1681m(a).

Petitioners correctly state that FCRA was designed to promote efficiency for business transactions and protect consumers' privacy in their confidential information and transactions. GEICO Br. 2; Safeco Br. 5, *citing TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). Congress granted businesses the privilege of access to vast amounts of otherwise personal and confidential consumer information, including social security numbers, business transaction histories, loan transactions, banking data and extensive personal histories such as employment information. It provided, however, that this privilege would come with the responsibility of informing consumers whenever that information resulted in an adverse action against them. 15 U.S.C. § 1681m. As Senator Proxmire, the original proponent, explained, "[i]n this way the individual is alerted to the existence of possible inaccuracies in his credit file and has an opportunity to take corrective action." 115 Cong. Rec. 2415 (Jan. 31, 1969).

FCRA's notice procedure was intended to promote the use of *accurate* credit information when businesses make decisions based on credit risks. *See* 15 U.S.C. § 1681(a)(1) ("Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the con-

tinued functioning of the banking system"); 15 U.S.C. § 1681(b) (a purpose of FCRA was to create a system that was "fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information"). Congress was particularly concerned that consumers not be treated adversely based on inaccurate, dated, and incomplete information. *See* S. Rep. No. 91-517 at 1 (1969) ("the purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a consumer report.").

Through the notice procedure, every consumer has a fair chance each time credit information is used against him to ensure that the business is reviewing *his* credit information and not someone else's, which often happens by mistake or through identify theft, and that the credit information used against him is accurate, current, and complete.

In crafting FCRA's liability provisions, Congress created several different levels of increasing liability with correspondingly increasing standards for proof of culpability. Plaintiffs who seek to recover only actual damages based on a violation of FCRA must prove that the defendant acted negligently. 15 U.S.C. § 1681o. Plaintiffs who seek alternative statutory damages provided by Congress of between $100 and $1,000 for each violation (as respondents do here) or punitive damages must prove that defendants "willfully fail[ed] to comply" with FCRA. 15 U.S.C. § 1681n(a)(1)(A). As discussed below, this civil willfulness standard requires more than negligence, namely at least recklessness, but falls below the standard that Congress required to prove liability under other FCRA sections, including other civil, administrative and criminal liability sections where Congress expressly required proof of a "knowing" violation. 15 U.S.C. §§ 1681n(a)(1)(B) & (b), 1681q, 1681r.

The Insurance Industry's Use of Credit in Underwriting Policies and Determining Premiums. Petitioners generally accurately describe how insurance companies use credit information when underwriting consumers' insurance poli-

cies. Insurance companies assign a version of a credit score—called an "insurance score"—to each applicant because they believe credit risk correlates with insurance risk. These scores are based on information in each consumer's credit report maintained by the various consumer reporting agencies. The insurance companies then use that credit score, in conjunction with other factors, in their underwriting to determine the insured's company placement and premium.

In GEICO's system, for example, an insured calls a 1-800 number to apply for insurance. GEICO JA 20. Typically, one lead company—here Government Employees Insurance Company and Safeco Insurance Company of America—employ the personnel who take these calls, process the information, and, in connection with the underwriting, decide the company placement and premium. GEICO JA 33, Safeco Rec., D.E. 90. The lead company's sales representative obtains information, including credit information, and a computer calculates the insured's risk based on the insurance score and other factors such as age and driving history to determine company and tier placement. GEICO JA 20. The customer is then considered for insurance in one of the affiliated companies in a descending order of preference: first in the preferred company that offers the lowest rates to those with the best credit and least associated risks; if denied insurance with the preferred company, the applicant is then considered for a higher-risk "standard" company that offers higher rates to those with slightly higher risks; and then, if the consumer has even worse credit and other related risk factors, the consumer is placed in the highest-risk company with the highest rates. GEICO JA 33; Safeco Rec., D.E. 90. The company places the consumer in the insurance company it chooses based on his credit information and other risks; the consumer likely has no knowledge of the differences in companies because he called, for instance, a 1-800 number for "GEICO" and, in fact, received "GEICO" insurance, albeit with a GEICO affiliated company with higher rates.

Contrary to the suggestion of petitioners and various insurance industry *amici*, insurance companies do not limit their best rates and placements to consumers with "perfect credit" or to "a make-believe super consumer." GEICO Br. 17. Rather, there are different ranges of credit scores that, in conjunction with other factors, the industry uses to determine those who receive the lowest premium rate. GEICO, for example, uses broad ranges of credit scores to assign consumers to one of the three companies and several tiers within those companies, and consumers with far less than perfect credit can qualify for the lowest cost policy.[2]

Moreover, each insurer itself decides the range of credit scores necessary to get the lowest rate offered and which customers are charged higher rates based on their credit scores. The range of credit scores necessary to get the lowest rate offered was not imposed by Congress or the Ninth Circuit.[3] As the United States' amicus brief notes, Congress also does not require petitioners to use consumers' credit information; petitioners have chosen to use confidential credit information in their underwriting. FCRA merely requires that users, having received the privilege of access to this confidential information, give notice when they treat consumers adversely by denying insurance or increasing the charge for insurance based in part on a review of credit information.

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[2] For instance, GEICO assigned "credit weights" corresponding to various credit scores. Credit weight is the relative weight assigned to credit when considered with other factors, such as driving history, to determine policy cost and placement. GEICO used credit scores ranging from 1 through 990. GEICO JA 67-68. The top credit weight was 105, corresponding to credit scores from 745 through 990, a broad range that does not require "perfection." *Id.* A somewhat lower credit weight might still qualify an applicant for the best rate at GEICO General if other factors, such as driving record, were very favorable. GEICO JA 67-68.

[3] GEICO decided to use credit scores "to maintain a competitive position" because "some major competitors already use credit scoring as an underwriting factor." GEICO JA 59.

Petitioners and their insurance industry *amici* complain that most people do not get the lowest rate offered—a complaint not likely to become part of any advertising slogan—but this is only because insurance companies have chosen to segment the market and risks such that they offer their lowest rate to only a part of the overall pool. There is no "perfect credit" standard, but only the relative standard that each particular insurer sets as the cut-off for obtaining that insurer's lowest available rate.

Federal Trade Commission (FTC) Guidance on FCRA Confirms the Clear Statutory Requirements That Notice Must Be Given to Insurance Applicants When They Pay Higher Premiums Based in Part on a Review of Their Credit Information. In addition to the plain text of the FCRA, the insurance companies had specific guidance from the FTC that the "adverse action" provisions were to be interpreted broadly, applied to *all* actions that could be considered to have a negative impact, and specifically applied to charging consumers higher rates in connection with initial applications. In its official commentary drafted pursuant to notice and comment rulemaking procedures, the FTC informed businesses in 1997 that "the term adverse action is defined very broadly by Section 603 of the FCRA. 'Adverse actions' include all business, credit, and employment actions affecting consumers that can be considered to have a negative impact[.]" 16 C.F.R. Pt. 601, App. C (Prescribed Notice of User Responsibilities); 62 Fed. Reg. 35586 (July 1, 1997).

More specifically, in October 1998, the FTC provided a pamphlet for insurers titled, "Consumer Reports: What Insurers Need to Know." Safeco JA 65-68. It informed insurers that amendments to the FCRA "increase the legal obligations of insurers who use consumer reports" and that the disclosure requirements apply to "new applicants as well as current policy holders." Safeco JA 65. It further stated that the decision to "charge a higher premium" to an initial applicant was an adverse action even if credit information played only a minor

role in the decision. *Id.* at 66-67 (also noting that a decision to deny insurance at "standard rates" is an adverse action).

In March 2000, before the adverse actions at issue in both cases here, the FTC staff wrote a letter in response to a question from an insurance company lawyer named James Ball. Letter from Hannah A. Stires (FTC) to James Ball (Mar. 1, 2000) ("FTC Ball Letter"). The letter, posted on the FTC website at http://www.ftc.gov/os/statutes/fcra/ball.htm, reviewed the law and reminded insurers that an "adverse action" occurs when "the applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report had been more favorable." This included not giving a discount to an initial insurance applicant based in part on his or her credit score. The FTC concluded that an initial insurance applicant whose premium is increased due to his credit information is "precisely the type of consumer that Section 615(a) [15 U.S.C. § 1681m(a)] is designed to assist." *See also Mick v. Level Propane Gasses, Inc.*, 1999 WL 33453772 at *12 (S.D. Ohio 1999) (stating that charging initial applicants higher rates for gas contracts than if they had paid cash could be adverse actions if based in part on credit scores).

Neither petitioners nor their *amici* cite guidance from any source prior to their violations of the statute that suggests, let alone states, that insurers may use credit scores to deny applicants insurance or increase initial rates without providing adverse action notices. Further, petitioners were invited by the FTC to obtain guidance, as Mr. Ball did on behalf of his insurance company client, if "the matter involves a substantial or novel question of law or fact and there is no clear Commission or court precedent." 16 C.F.R. § 1.1(1). Even assuming for the sake of argument that the statute was not clear, petitioners at a minimum recklessly chose to proceed with their conduct by ignoring the FTC Ball Letter and failing to seek clarification from the FTC, clarification that existed and confirmed that they were violating FCRA's plain terms.

Safeco's Adverse Action Against Respondents Burr and Massey. Respondents Charles Burr and Shannon Massey applied to Safeco for automobile and renters insurance, respectively (Burr in 2002 and Massey in 2001). The undisputed facts are that Safeco checked their credit information and, based in part on that information, issued them policies at higher rates than they would have received if they had better credit. *See* Safeco Pet. App. 4a-5a.[4] Safeco gave notice to neither Burr nor Massey. The record contains no contemporaneous documentation of the reasons Safeco decided not to provide them notice. However, Safeco was aware that the FTC provided guidance regarding the Fair Credit Reporting Act. In fact, Safeco directed its employees to the FTC website that included the pamphlet "Consumer Reports: What Insurers Need to Know" and noted that the website included "information on what insurers need to know about the use of consumer reports." Safeco JA 69 (referring to FTC website as a "good resource"); Safeco JA 65-68 (FTC Pamphlet); *see also* Safeco JA 44-45 (testimony that Safeco representative "ha[d] heard about FTC with some opinions").

Following its ruling in another case that charging a higher amount to a new applicant is not an adverse action, *see Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307 (D. Or. 2003), the district court granted Safeco summary judgment against Burr and Massey. Safeco Pet. App. 11a-12a. The Ninth Circuit reversed based on its contrary resolution of the adverse action issue in *GEICO* and remanded for consideration of willfulness under the "reckless disregard" standard announced in *GEICO*. Safeco Pet. App. 1a-2a. Safeco petitioned for certiorari solely on the question whether the Ninth Circuit "erred in holding that a defendant can be found liable for a 'willful'

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[4] Safeco's brief notes that the premium for an *earlier* policy it issued Burr was not based on credit information because he would not have qualified for a lower rate regardless of credit. Safeco Br. 7. That is not the policy at issue, so the point is irrelevant other than to contradict Safeco's position that Burr was an initial applicant to the Safeco companies.

violation of [FCRA] upon a finding of 'reckless disregard' for FCRA's requirements," and did not seek review either of the adverse action issue or the application of the willfulness standard to the facts. Safeco Pet. i.

GEICO Denied Edo Insurance and Increased His Rates Based, in Part, on His Credit Score. GEICO determined respondent Ajene Edo's rates and placement in connection with the underwriting of his policy using its standard process for considering credit information. After Edo called a 1-800 number, GEICO obtained his credit information and used it to generate his insurance score. GEICO JA 20-21. Based in part on consideration of his credit in the underwriting process, GEICO denied Edo insurance with the preferred company GEICO General, which offers the lowest rates, and issued Edo a more expensive policy with GEICO Indemnity. GEICO JA 34-35. It is undisputed that if Edo had better credit, he would have received a less expensive policy from GEICO General. GEICO JA 34-35, 80. As GEICO's "credit matrix" reveals, if Edo's insurance score were higher, he would have received a higher "credit weight" that would have qualified him for placement with the preferred and least expensive company GEICO General. GEICO JA 67-68.

GEICO Created a Separate Procedure Outside of Its Underwriting Process to Avoid Providing Notice to Adversely Impacted Consumers. Despite having already used Edo's confidential consumer information against him by denying him insurance with the lowest cost GEICO company in the underwriting process, GEICO used an entirely separate process to decide whether to give the "adverse action" notice. GEICO consciously decided to give notice based only on a comparison between how it actually treated customers based on their credit scores and how it *would* have treated some hypothetical consumer based on a purportedly "neutral" or average credit score. GEICO JA 34, ¶ 19.

Specifically, GEICO created a purportedly "neutral" score that it claims represents an average consumer with "average" loss experience. GEICO JA 45-46. GEICO has not

revealed whether this is an average of just its own consumers, a segment of consumers of any particular GEICO subsidiary or affiliate, or all consumers in America; nor has GEICO provided any other purported basis for this number. *Id.* Although GEICO claims to have "neutralized" credit for the purpose of FCRA, GEICO never truly eliminates credit from consideration.[5] Rather, GEICO assigns an actual "credit weight" number to the neutral score. GEICO assigned the number 56 to their "neutral" credit weight, which is approximately half their top credit weight of 105. GEICO JA 67-68.[6] Even if GEICO denied someone insurance or increased his charge based on his credit score, GEICO decided only to give notice if the consumer's placement was worse than that of the hypothetical "average" consumer. GEICO JA 34-35. Thus, even though Edo had been *denied* insurance with GEICO General and received a higher premium from GEICO Indemnity based on GEICO's assessment of *his* credit score, GEICO decided not to send him notice because

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[5] In citing various insurance statutes and agency bulletins from 23 different states (*see* GEICO Br. 5 & n. 5), GEICO posits that these states "ensure that consumers with thin credit history, or no identified credit history, are not adversely treated." Not only is GEICO's reliance on these authorities misplaced, because adverse action notice requirements are controlled by federal, and not state, law (*see* 15 U.S.C. § 1681t(b)(1)(C)), but GEICO misleadingly characterizes state laws that provide for use of "neutral" credit information in setting insurance premiums. The statutes and bulletins cited by GEICO do no more than *prohibit* use of an absence of credit history, or an inability to determine credit history, in setting insurance premiums, unless the insurance company treats those consumers as if they had neutral credit information. Edo does not contend that GEICO's procedure for assigning a neutral credit weight to "no-hits" or consumers without ascertainable credit history violated any law. Edo's insurance premium was based on a review of *his* credit information, and not the hypothetical "neutral" credit information some states permit insurance companies to use when they *cannot* locate credit information.

[6] The neutral credit weight roughly corresponded to a credit or insurance score of 600. GEICO JA 67-68. The top credit weight corresponded to an insurance score between 745-990. *Id.* Edo's score was 620. *Id.*

GEICO posits that it would have also denied him insurance with GEICO General *if* he had another person's "neutral" credit information and score. GEICO JA 34, ¶19.

GEICO Decided Not to Provide Notice to Consumers Even Though It Understood It Was Taking Adverse Actions Against Them. GEICO understandably wants this Court to decide its summary judgment motion, and be the first to decide it, without consideration of any factual record and based largely on a presumption of good faith because the facts, as they exist in the record and when more clearly developed on remand, will demonstrate GEICO knew it was taking "adverse actions" against consumers without notice or was reckless in doing so. At the very least, there is disputed evidence that would prevent summary judgment if this issue were considered by the district court.

Deposition testimony confirmed that GEICO "always" considered placing someone in a higher-premium company or tier an "adverse action." GEICO JA 49. Internal GEICO documents only recently produced also show that before GEICO designed its separate system for notice, GEICO's credit score team directly considered the question of adverse action, and, two years before Edo applied for insurance, stated that "adverse action" would include the treatment Edo suffered—i.e., placing an initial applicant in a company or tier lower than GEICO's most preferred tier, if the decision is based in part on credit.[7] The credit team expressed concern,

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[7] This document was not part of the summary judgment record because GEICO delayed production until September 21, 2006, even though, as GEICO acknowledged in producing it, it was directly responsive to plaintiff's first request for production served in June 2002—long before GEICO's summary judgment motion filed in 2003. We have sought leave to lodge the document with the Clerk's Office. We refer to the document not because we believe this Court should itself consider it as evidence of GEICO's willfulness, but because it illustrates the type of evidence that will be available if, as the Ninth Circuit ordered, these cases are remanded for consideration of the factual record, and it emphasizes the

(*Footnote continued*)

however, that providing notice to all applicants who received such treatment would raise cost issues and lead to inquiries and complaints from consumers. *See also* GEICO 9th Cir. Excerpts of Record 226 (discussing concerns about curbing postal expense).[8]

There is also evidence GEICO misled state regulators that it was giving *all* consumers proper FCRA notice. In 1999, before Edo's adverse treatment in this case, the Oregon Insurance Division asked GEICO if "all applicants or requesters for a quotation get written disclosure if an adverse action, including rejection, refusal to quote, or higher rate, is made based on a credit report." GEICO JA 58. GEICO falsely and misleadingly answered "Yes" without further explanation, even though it did not give all applicants notice if they received a higher rate based on their credit report. *Id.* GEICO was also specifically asked if there were any differences between how it treated someone with no discoverable credit-information (called a "no hit") and "the treatment offered to your best credit scores." GEICO succinctly replied "[t]here are none," GEICO JA 58, although the undisputed evidence from GEICO's documents is that persons assigned neutral scores were treated worse than those with the best scores.[9]

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inappropriateness of any suggestion that this Court should apply the willfulness standard, in the first instance, to an incomplete factual record.

[8] In fact, GEICO initially provided notice to all consumers who were not placed in the lowest cost company and tier (GEICO JA 19), but abandoned that practice by the time of the adverse action against Edo.

[9] GEICO assigned its "neutral" credit score and weight to "no hit" applicants. GEICO JA 60. As noted above, the neutral credit weight was approximately half the top credit weight. GEICO JA 68. GEICO also consistently instructed its counselors to enter all possible personal identifying information for an applicant, such as current address and social security number, because "[o]bviously if an applicant has a really good insurance score, and we failed to enter enough information to make a match, the score returned will not be as high as his/her real score and could possibly affect placement." GEICO JA 75 (emphasis added). Thus, GEICO acknowledged that the neutral scores assigned to "no hit" consumers "obviously" could negatively impact placement.

Despite the clear text and purpose of the FCRA, its own understanding of an "adverse action," and the specific regulatory guidance referenced above, GEICO continued to abuse the privilege of being able to review consumers' confidential information and then used that information against consumers, but did not change its practice for giving "adverse action" notice until December 2002, months after this lawsuit was filed. In December 2002, GEICO began giving notice to applicants denied insurance or whose rates were increased because they did not have the credit score necessary to qualify for the lowest cost company or rate. GEICO JA 48-49.

SUMMARY OF ARGUMENT

The Ninth Circuit Properly Defined Willfulness to Include Knowing or Reckless Disregard for the Law. The Ninth Circuit properly defined a willful violation based on the clear text and context of FCRA to include a policy or action carried out "either knowing that policy or action to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy or action contravened those rights." GEICO Cert. App. 31a, *quoting Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997) (brackets omitted). Contrary to petitioners' arguments, the Ninth Circuit never equated willfulness with mere negligence and expressly rejected negligence as the standard.

The Ninth Circuit's definition is dictated by the clear text and context of FCRA. In each instance where Congress intended to require proof of a "knowing" violation, it did so expressly. The definition is also consistent with FCRA's structure. Recovery of actual damages requires proof of only a negligent violation. 15 U.S.C. § 1681o. Recovery of minimum statutory damages or punitive damages requires proof of a willful (that is, reckless) violation. 15 U.S.C. § 1681n(a)(1)(A). Recovery of higher statutory damages for aggravated misconduct or imposition of criminal liability requires proof of a willful and *knowing* violation. 15 U.S.C. §§ 1681n(a)(1)(B), n(b); 15 U.S.C. §§ 1681q, r, s(a)(2)(A).

The Ninth Circuit's definition also closely follows this Court's precedents dating back to at least the 1930's. Since that time, this Court has consistently concluded that "willful" violations of similar civil statutes include conduct done in reckless disregard of the rights of others. This would be a particularly unusual case in which to require a higher standard given that when Congress wanted to specifty a higher *mens rea* in FCRA, it expressly required proof of a willful and knowing violation. *See e.g.*, 15 U.S.C. §§ 1681q, r.

Petitioners' proposed objective test for proving a willful violation—as well as parts of the United States' proposed test—also contradicts this Court's precedents and well-established tort law. To prove a willful violation, a plaintiff must show either knowing or reckless disregard for the rights of others. In this fact-specific inquiry, the trier of fact must consider both subjective and objective factors. Subjective factors include whether the defendant actually understood or was conscious of an unjustifiably high risk that its conduct violated FCRA. Even within this subjective inquiry, a trier of fact may infer from the obviousness of the risk that the defendant was aware of it but recklessly proceeded anyway. Because direct evidence of intent/knowledge (e.g., a memo or testimony admitting intent to violate the law) is rare, the trier of fact may also consider objective factors as part of the totality of circumstances to determine recklessness. Thus, a jury may ask if a reasonable person in defendant's position should have been aware of an objectively high risk that its conduct violated the law. Objective factors, although important in the overall mix, are not a shield or complete defense to prevent inquiry into subjective intent, as petitioners and the United States suggest, but an alternative method of proof where clear evidence of subjective intent is absent.

This Court should conclude, as it has in the past, that a civil willful violation may include either a knowing or reckless violation. The Court should then remand this case for consideration of the full factual record by the district court. If this Court is to go beyond the questions presented and be-

come the first court to apply the standard to any facts, there is sufficient evidence to raise fact issues that petitioners, subjectively, knowingly violated FCRA or ignored an unjustifiably high risk that they had taken adverse actions against respondents and failed to give notice. Even if one considers only the objective factors, petitioners' actions represented a sufficiently reckless departure from the clear requirements of FCRA and associated guidance from the FTC to create a fact issue as to whether petitioners recklessly ignored a high risk that their conduct violated FCRA.

The Ninth Circuit Properly Concluded That GEICO Took an "Adverse Action" Against Edo. The Ninth Circuit correctly held that GEICO took an "adverse action" against Edo when, based on review of his credit information, it denied him insurance with GEICO General and increased the charges for his insurance by issuing him a more expensive policy with GEICO Indemnity. GEICO's argument that Edo's credit information had no impact on his placement or decreased his charge for insurance misstates the factual record. It is undisputed that GEICO, in connection with underwriting Edo's insurance, both denied him insurance with GEICO General and increased his premiums based, in part, on a review of *his* credit information (and not some other average person's purportedly neutral credit score). That is the definition of an adverse action under FCRA. 15 U.S.C. § 1681a(k)(1)(B)(i). Nothing in FCRA permits GEICO, after already adversely treating Edo in the underwriting process, to avoid its notice obligation by positing that it would have also denied Edo insurance if he were a hypothetical consumer with a purportedly "neutral" or "average" credit score.

GEICO's argument not only contradicts FCRA's plain text, but also eviscerates a primary purpose of FCRA, which is to ensure the accuracy of the credit information that is used against consumers. Under GEICO's notice system, GEICO always presumes that it is using accurate credit information when it compares consumers to a purportedly neutral or average score and only provides notice if those consumers are

treated worse than average. If a consumer actually has very good credit or even the best credit, but the information in his credit file is not accurate, as commonly occurs, GEICO will not give notice as long as that consumer is treated no worse than the hypothetical average consumer. The consumer may, in fact, qualify for the best rate based on his accurate credit information. GEICO, however, will never provide him notice, thus denying him the timely opportunity to check his consumer report for identify theft or other inaccuracies that may have resulted in negative treatment. The plain text and purpose of the statute foreclose the possibility that Congress intended to allow GEICO to avoid giving thousands of consumers proper notice based on a faulty presumption that GEICO must be reviewing accurate credit information and need not give consumers any opportunity to check.

ARGUMENT

I. A Willful Violation Includes a Knowing or Reckless Disregard For The Law.

A. The Text of 15 U.S.C. § 1681n(a) Demonstrates That a "Willful" Violation Includes a Reckless Violation.

In 15 U.S.C. § 1681n(a), Congress provided civil liability for willful non-compliance of FCRA. Under section 1681n(a)(1)(A), Congress provided that a consumer could recover, among other things, statutory damages of between $100 and $1,000 and punitive damages for any willful violation of the statute. The term "willfully" has appeared in section 1681n since FCRA's enactment in 1970. At that time, despite petitioners' claims to the contrary, it was well established that a willful violation included a reckless disregard for the rights of others. *See United States v. Murdock*, 290 U.S. 389, 396 (1933) (stating that a willful violation may include "conduct marked by careless disregard whether or not one has the right so to act"), *overruled on other grounds, Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 57 (1964); *see also United States v. Illinois Cent.*

R.R., 303 U.S. 239, 242-43 (1938) (citing *Murdock*'s careless disregard standard and holding that civil defendant's conduct was "willful" if it showed either intentional disregard for statute or an "indifference to its requirements.")

To support their narrower concept of the term willful, petitioners point this Court to the legal definition of "gross negligence" and give an incomplete definition of "willful" from Black's Law Dictionary. They fail to note that the complete legal definition of "willful" in the 1968 dictionary included:

> recklessness, [a] disregard of consequences, an indifference whether a wrong or injury is done or not, and an indifference to natural and probable consequences.
>
> . . .
>
> The word "reckless" as applied to negligence is the legal equivalent of "willful" or "wanton."

Black's Law Dictionary at 1773 (4th Ed. 1968) (citations omitted). "Willful misconduct" of an employee was similarly defined to mean:

> more than mere negligence, and contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries or with reckless disregard of the probable consequences.

Id. at 1774. When Congress amended section 1681n(a)(1)(A) in 1996 specifically to provide for statutory damages of between $100 and $1,000 and retained the use of the willfulness standard (Pub. L. No. 104-208, 110 Stat. 3009 (1996)), the definition of a civil willful violation continued to include recklessness. *Black's Law Dictionary* 1599-1600 (6th Ed. 1990) (*citing Murdock*, 290 U.S. at 394-95 and describing willful conduct as including "careless disregard whether or not one has the right to so act.") Thus, the common legal definition of willful at the time of enactment and amendment of section 1681n included recklessness.

B. Congress's Use of the Word "Willfully" in Context Confirms That a "Willful" Civil Violation is Less Than a Knowing Violation.

Petitioners contend that willfulness in FCRA is limited to "knowing" violations. However, even apart from the common legal definition, the text of section 1681n(a) in context makes clear Congress did not intend a civil willful violation to require proof of a knowing violation. *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596 (2004) (stating "the cardinal rule that statutory language must be read in context [because] a phrase gathers meaning from the words around it.") (internal quotation marks deleted).

Where Congress intended to require proof of a knowing violation in FCRA, it specifically used the word "knowing" or "knowingly." In the immediately subsequent subsections 1681n(a)(1)(B) and 1681n(b), Congress provided that in cases where a person obtains a consumer report not only "willfully" but also "under false pretenses or knowingly without a permissible purpose," the consumer could recover either actual damages or a minimum of $1,000, whichever is greater. Had Congress intended the word "willful" in the beginning of section 1681n(a) to require a knowing violation, the additional requirement in the following subsections that the defendant "know" that it did not have a permissible purpose under FCRA would be rendered insignificant if not superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (stating that this Court avoids interpretations of statutes that leave terms insignificant or superfluous). Similarly, subsequent subsections of FCRA imposing criminal penalties for conduct done not only "willfully" but also "knowingly" would be redundant if willfulness under FCRA already required knowledge of a violation. *See* 15 U.S.C. § 1681q (criminal liability section that provides liability for any person who "knowingly and willfully obtains" false information); 15 U.S.C. § 1681r (criminal liability section requiring proof of conduct done "knowingly and willfully"); *see also* 15 U.S.C. § 1681s(a)(2)(A) (providing the FTC the right to enforce

civil penalties upon proof of a "knowing violation" and recovery of up to $2,500 per violation).

Safeco concedes that Congress's use of the word "knowing" in sections 1681n(a)(1)(B) and 1681n(b) must refer to a knowing violation of the law—knowledge that defendant has an impermissible purpose under FCRA—and not merely knowledge of the underlying facts or of the factual consequences of the conduct. *See* Safeco Br. at 19 (conceding that "although the term 'knowingly' sometimes implies mere factual knowledge," *citing Bryan v. United States*, 524 U.S. 184, 191 (1998), "the straightforward grammatical reading of § 1681n(a)(1)(B) is that the adverb 'knowingly' modifies 'without a permissible purpose' such that knowledge of the unlawfulness of the purpose is required.") In this context, it is not possible, as it was in *Bryan* (a criminal case), that Congress used the terms "knowing" and "willful" in the same section to distinguish between knowledge of the facts and willful "knowledge of a violation of the law." Thus, the only plausible understanding of the term "willfully" in connection with its *earlier* use in section 1681n(a) is to provide a lesser standard of culpability than a knowing violation of the law.

If "willfully" already meant "knowingly" in the opening sentence of section 1681n(a), consistency would have demanded that Congress use the term "willfully" within the statute such that the immediately subsequent references in section 1681n(a)(1)(B) and 1681n(b) would have provided liability for any person who obtained a consumer report "under false pretenses or *willfully* without a permissible purpose." Indeed, since section 1681n(a)(1)(B) is already subject to the willfulness requirement of section 1681n(a), no further reference to either knowledge or willfulness would be necessary in that subparagraph under petitioners' view of willfulness. By requiring additional proof of knowledge in subsections 1681n(a)(1)(B) and 1681n(b), Congress clearly indicated that the earlier "willful" standard necessary to prove a

violation of section 1681n(a)(1)(A) meant something less than a knowing violation.[10] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *see also United Dominion Indus. Inc. v. United States*, 532 U.S. 822, 836 (2001) (same).

Petitioners' contrary arguments violate the principle that Congress "says in a statute what it means and means in a statute what it says there[.]" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). Petitioners argue that Congress's initial use of the term "willful" alone in connection with subsection 1681n(a) and 1681n(a)(1)(A) must require proof of a knowing violation because Congress subsequently required a "knowing" standard in the later subsections 1681n(a)(1)(B) and 1681n(b). *See* Safeco Br. at 20; GEICO Br. at 32 (stating that the initial use of the term "willful" must "subsume" and "encapsulate" the latter use of the term "knowing.")[11] This interpretation stands the statute on its head so that the *later* specific references requiring proof of knowledge modify the *earlier* use of the term willful. Peti-

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[10] As the United States notes, Congress also indicated the difference between "willful" and "knowing" misconduct in the titles of these subsections. U.S. Br. 14. Section 1681n's title is "**Civil liability for willful noncompliance**" and § 1681n(b)'s title specifically refers to "**Civil liability for knowing noncompliance.**" Because the distinction is evident in the text of the statute, however, this Court need not refer to the titles. *See Carter v. United States*, 530 U.S. 255, 267 (2000) (stating that this Court will only consult titles of statutes to shed light on ambiguous text).

[11] GEICO claims the initial reference to willfulness in section 1681n(a) refers to conduct done with an "evil heart," or "bad intent" involving "actual knowledge of illegality." GEICO Br. at 31-32. This argument also fails to explain Congress's distinct use of the terms "willfully" and "knowingly." Moreover, this Court has held that a plaintiff, even to recover punitive damages, need not prove that defendant had an evil motive in his heart; conduct that is in reckless disregard of the rights of others suffices. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 538 (1999).

tioners cannot redraft the text to reach this result. *Dodd v. United States*, 545 U.S. 353, 359 (2005). The only logical interpretation is that the initial general reference to willful violations requires proof of less than knowing violations, such as recklessness, and where Congress wanted a higher standard of proof, it explicitly demanded proof of knowing violations in later subsections. *Russello*, 464 U.S. at 23.

C. Congress Created a Statutory Structure in Which Higher Levels of Liability Correspond to a Higher Standard of Culpability.

The structure of FCRA also demonstrates that Congress intended to have increasing levels of liability that correspond to gradually increasing requirements for proof of culpability. *See FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 132-33 (2000) (stating that a court must interpret a statute as a "symmetrical and coherent regulatory scheme" and, where possible, fit "all parts into a harmonious whole"). Thus, if a plaintiff seeks recovery of actual damages only, he need only prove negligence. 15 U.S.C. § 1681o. If a plaintiff intends to seek statutory damages and the possibility of a punitive award, he must prove the defendant acted "willfully" but not necessarily with knowledge of the violation of the law; that is, recklessness is sufficient. 15 U.S.C. § 1681n(a)(1)(A). To obtain the higher per-violation damages provided by subsections 1681n(a)(1)(B) and n(b), or 1681s(a)(2)(A), the plaintiff (or the FTC) must prove a knowing violation, and if criminal liability is pursued, the government must prove a "knowing and willful" violation. 15 U.S.C. §§ 1681q, r.

Petitioners nonetheless argue that this Court should interpret the term "willfully" in the civil liability section 1681n(a) to have the same meaning as the terms "knowingly and willfully" in the criminal provisions of sections 1681q, r. GEICO Br. 31; Safeco Br. 23. Petitioners' argument that the term "willfully" requires the same standard of "knowing violation of the law" for recovery of both the lesser civil statutory penalty under section 1681n(a) and the more extreme criminal penalty under sections 1681q and 1681r is inconsistent with

the logical structure of gradually increasing liability and standards of culpability as well as with Congress' considered use of the term "knowingly and willfully" in the criminal sections, but not section 1681n(a).[12] As the United States' amicus brief states, these terms, when used together, clearly indicate a higher level of culpability than the merely "willful" misconduct required for certain civil violations in Section 1681n(a)(1)(A). U.S. Br. 14-15.

Even within the statutory remedies available solely to consumers, Congress followed a clear structure of increasing liability upon proof of higher culpability. While section 1681n(a)(1)(A) provides for either actual damages or $100-$1,000 in statutory damages, and the chance of punitive damages, upon proof of willful, but not necessarily knowing violations, sections 1681n(a)(1)(B) and 1681n(b) both provide for actual damages *or $1,000, whichever is greater*, upon additional proof of knowing non-compliance. Thus, even though punitive damages are theoretically available under section 1681n(a)(1)(A), there is nonetheless a *minimum*

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[12] Safeco argues that Congress could not have intended a lower intent threshold for failing to provide notice, something that was purportedly less central to Congress's concerns, and a higher intent standard for proving improper use of credit information, which was purportedly more central to Congress's concerns. Safeco's arguments and its attribution of relative values to Congress's intent are contradicted by the text of FCRA. Whenever Congress intended to provide additional sanctions for those who improperly use consumer credit information, it specifically required proof of knowing misconduct. *See e.g.*, 15 U.S.C. §§ 1681n(a)(1)(B), 1681n(b), 1681q, 1681r. Where other violations were at issue, including but not limited to the failure to provide simple notice of an adverse action, Congress did not require proof of knowing misconduct (but imposed lower damages). 15 U.S.C. § 1681n(a)(1)(A). Further, Safeco's judgment that notice issues were "peripheral" to Congressional concern are contradicted by Congress's statement of purpose, which stated that the central purpose of FCRA was to ensure "accuracy and fairness of credit reporting." 15 U.S.C. § 1681(a). At the time of enactment when consumers had no right to receive an annual free credit report, the notice provisions were the method for ensuring that the credit information used was accurate.

required $1,000 statutory award for violations involving greater "knowing" culpability under section 1681n(a)(1)(B) (and the chance for punitive damages as well). That is ten times the minimum statutory damages provided under section 1681n(a)(1)(A) for other civil violations of FCRA that require a lower *mens rea* standard.

Safeco argues that this logical remedial structure is somehow destroyed by the statutory penalties available to the FTC under 15 U.S.C. § 1681s(a)(2)(A). Under that section, the FTC may recover what Safeco describes as a "modest civil penalty" of up to $2,500 per violation if it proves a pattern or practice of "knowing" violations of FCRA. Safeco Br. 22. (Ironically, while Safeco describes a potential $2,500 per violation award as "modest," it describes the lower private statutory damages of $100-$1,000 per violation as creating "astronomical" exposure. Safeco Br. 34.) The $2,500 per violation statutory award is up to two-and-a-half times, and potentially twenty-five times, the $100-$1,000 statutory award available to consumers on proof of a lesser willful violation. Even with the remote possibility of a discretionary award of punitive damages, the significant multiplier available to the FTC on proof of knowing violations naturally fits into a statutory scheme where consumers may get lesser statutory remedies than the FTC on proof of lesser culpability.

Safeco also points out that before 1996, courts had held that a plaintiff could seek civil liability against a defendant for improperly obtaining a consumer report, but that civil liability derived from proof that defendant violated 15 U.S.C. § 1681q, the criminal provision dealing with impermissible use of credit reports, because there was no specifically applicable civil liability section. Safeco argues that in adding 15 U.S.C. § 1681n(a)(1)(B), which expressly provided civil liability for knowing impermissible uses of credit reports, Congress "implicitly" adopted the reasoning of pre-1996 decisions under which civil liability could be premised on a violation of 15 U.S.C. § 1681q as long as the liability was sought through the culpability standards of 15 U.S.C. §

1681n (requiring proof of willfulness) and not the lower culpability standards of 15 U.S.C. § 1681o (requiring proof of negligence). Safeco Br. 23-24, n 6, *citing* cases. Safeco's "implicit adoption" argument ignores the explicit text of the amendment to FCRA. Expressly adopting the same standard used in the criminal provision, Congress specifically required proof of a "knowing" impermissible use of a credit report to recover actual damages or $1,000, whichever is greater, in civil liability cases. 15 U.S.C. §§ 1681n(a)(1)(B) & n(b). If anything, its decision to do so solely in connection with impermissible uses of credit reports under those sections, but not to require any higher standard of proof for other civil violations of section 1681n(a)(1)(A) demonstrates that it intended to require proof of a knowing violation only for civil sections 1681n(a)(1)(B) and n(b).

D. The Ninth Circuit's Interpretation Is Consistent With This Court's Precedents.

The Ninth Circuit's "knowing or reckless disregard" standard is also consistent with this Court's precedents defining willfulness in the same manner in other similar *civil* statutes. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (holding "willful" requires only proof of a "reckless disregard for the matter of whether its conduct was prohibited by the ADEA"); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985) (same); *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988) (finding same knowing or reckless standard for willful violation under Fair Labor Standards Act); *Illinois Cent. R.R.* 303 U.S. at 242-43 (holding that civil defendant's failure to unload cattle car was "willful" because it showed disregard for statute and indifference to requirements). In *McLaughlin*, this court, relying on the plain language of the FLSA, stated:

> The word "willful" is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The stan-

> dard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the Act.

McLaughlin, 486 U.S. at 133.

Petitioners, particularly Safeco, argue that there are competing lines of precedent in which this Court has, on occasion, interpreted the term "willful" to include recklessness and, on other occasions, required proof that defendant knew its conduct was unlawful. Safeco Br. 17-18. Although respondents agree that the term willful has been interpreted in context, there are no truly competing lines of Supreme Court authority interpreting *civil* statutory willfulness provisions. The civil cases cited above consistently hold that recklessness is sufficient. Petitioners cite cases requiring proof of knowledge in criminal statutes where this Court has occasionally required a higher knowing standard, but this Court has also adopted a recklessness standard depending on the text and context of the criminal statutes involved.[13]

This Court's decision in *Thurston* is particularly instructive. In *Thurston*, this Court observed that the Age Discrimi-

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[13] *See United States v. Bishop*, 412 U.S. 346, 360 (1973) (requiring proof of violation of a known legal duty in criminal tax case); *Bryan*, 524 U.S. at 191 (holding that a conviction for willfully violating a statutory prohibition on unlicensed firearm sales requires proof that defendant knew its conduct was unlawful); *Ratzlaf v. United States*, 510 U.S. 135, 136-137 (1994) (holding that a willful violation of the anti-structuring provisions requiring reporting of transactions above $10,000 requires proof of knowledge of the unlawful conduct); *Cheek v. United States*, 498 U.S. 192, 201-02 (1991) (holding that a willful violation of criminal tax laws requires proof of knowledge of illegal conduct). *But see Murdock*, 290 U.S. at 396 (holding in a criminal case that willful conduct may include "conduct marked by careless disregard whether or not one has the right so to act"); *Thurston*, 469 U.S. at 126 (noting that criminal provisions of the FLSA are consistent with willful/reckless disregard standard); *Screws v. United States*, 325 U.S. 91, 104-05 (1945) (holding reckless disregard sufficient for criminal violation).

nation in Employment Act ("ADEA") had a "two-tiered" liability structure in which plaintiff could recover actual damages for non-willful violations and statutory liquidated double damages for willful violations. 469 U.S. at 125, 128. This Court concluded that interpreting "willful" to require a higher standard of either knowledge or recklessness was consistent with that two-tiered liability scheme.[14] *Id.* at 126-28.

As noted, FCRA provides more than just two tiers of liability, but several, including gradually increasing liability for (1) actual damages, (2) layers of increasing civil and administrative statutory penalties, and (3) criminal penalties for "willful and knowing violations." A "knowing or reckless" disregard standard fits even more comfortably into a three or more tiered structure in which the top tier of criminal liability is expressly dependent on knowing violations. As the amicus brief of the United States notes, petitioners' definition of willful "leaves little, if any, room between Congress's differently articulated criminal and civil provisions." U.S. Br. 15.

GEICO attempts to distinguish *Thurston* by arguing that while the ADEA double damages provision was purportedly considered "punitive,"[15] the ADEA's two-to-one statutory ratio damages "assures proportionality." GEICO Br. at 39. This argument is a non-sequitur. The proportionality of any damages ultimately awarded does not provide a basis for distinguishing the proper interpretation of willfulness under the ADEA and FCRA. Even if the statutory remedies in FCRA

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[14] In enacting the ADEA, Congress provided liquidated civil statutory damages as a compromise in place of criminal liability. *Thurston*, 469 U.S. at 124 (discussing Senator Javits amendment to replace criminal liability with liquidated damages). Despite this Court's recognition that liquidated damages were a substitute for criminal liability, it concluded that they could be obtained based only on reckless disregard for the law.

[15] GEICO argues that this Court concluded that such liquidated damages were punitive. However, the Court merely cited the legislative history that indicated that. Here, as discussed above, Congress provided for statutory damages (as an alternative to actual damages) apart from any punitive damage award.

could be considered punitive—and Congress did not so consider them, as it provided statutory damages as an alternative to actual damages and in addition to possible punitive damages—the Ninth Circuit's reckless disregard standard under FCRA is the same standard this Court has found constitutionally sufficient for awarding punitive damages. *See e.g. Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535-38 (1999) (permitting punitive damages in a Title VII case on proof of "reckless indifference to the federally protected rights of an aggrieved individual").[16] There is no distinction between *Thurston* and these cases.

GEICO also attempts to distinguish *Thurston* by arguing that the "unique" legislative history of the ADEA directed courts to interpret that statute consistently with the Fair Labor Standards Act (FLSA), whose provisions had already been interpreted to equate willfulness with reckless disregard. GEICO Br. 39. *Thurston*, however, did not rely only on legislative history, but relied on the plain text and context of the statute and this Court's interpretation of similar statutes. 469 U.S. at 128. Further, as noted above, there has been a "willful" provision in section 1681n since FCRA was enacted in 1970. The ADEA was enacted in 1967 and the extended FLSA limitation period for "willful" violations, at issue in *McLaughlin*, was added in 1966. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967); *McLaughlin*, 486 U.S. at 132 (discussing history of FLSA limitations period). There is no reason to distinguish Congress's understanding of the term "willfully" when enacting FCRA in 1970 from its understanding when it enacted similar provisions in the civil liability provisions in the ADEA and FLSA just a few years earlier. *See Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428

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[16] *See also Smith v. Wade*, 461 U.S. 30, 56 (1983) (permitting punitive damages in Section 1983 action based on reckless disregard standard); *Gertz v. Welch, Inc.*, 418 U.S. 323, 349 (1974) (requiring proof of reckless disregard for truth to recover punitive damages in libel case).

(1973) (stating that similar statutes with similar language should be interpreted consistently).

E. The Mere Possibility of Aggregated Class Damages Based on Proof of Reckless Disregard Should Not Influence This Court's Interpretation of the Substantive Text.

GEICO contends that interpreting FCRA's willfulness requirement to be any lower than a knowing standard somehow invites "grave constitutional doubts" because of the supposed potential for crippling liability based on the aggregation of statutory damages through class certification. GEICO Br. at 34-37. GEICO's attack, however, is not directed at the meaning of "willfully" in FCRA, but at an issue not presented on this record: the possibility of both a later certification of a class and an aggregate award of class damages. Congress's intent in using the term "willfully" cannot depend on whether this is an individual case, as it stands now, or whether it ultimately may result in class certification and an aggregate class award following a finding of willfulness.

This Court has rejected the argument that the possibility of "gigantic consumer class actions" under other consumer-protective laws should influence the interpretation of substantive provisions of the statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45 (1979). In *Reiter*, this Court interpreted § 4 of the Clayton Act to provide remedies for an injury to a retail consumer's "property." The defendants argued that such an interpretation, combined with the possibility of "gigantic consumer class actions" seeking treble damages for millions of transactions "will have potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event." *Id.* The Court dismissed the argument as involving "policy considerations that are more properly addressed to Congress than to this Court. However accurate [defendants'] arguments may prove to be—and they are not without substance—they cannot govern our reading of the plain language in [the statute]." *Id.* at 345.

Congress was well within its powers when it provided the alternative of statutory damages of $100-1,000 as (1) a liquidated damages remedy for the violation of the statute itself (here, the failure to give notice), (2) a substitute for difficult-to-establish actual damages that result from a failure to receive notice of an "adverse action" and other FCRA violations, and (3) an incentive to encourage compliance with federal law.[17] *See St. Louis, I.M. & S. RY. Co. v. Williams*, 251 U.S. 63, 66 (1919) (holding that statutory penalties of $50 to $300 for excessive charges by railroads did not violate due process and that legislatures have authority to provide additional statutory penalties for such "public wrongs"); *Overnight Motor Transp Co. v. Missel*, 316 U.S. 572, 583-84 (1942) (holding FLSA liquidated damages were "compensation" and renumeration for difficult to prove damages); *Kenro, Inc v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1166 (S.D. Ind. 1997) (holding that a $500 statutory damage award under the Telephone Consumer Protection Act was permissible because Congress may "design a remedy that will 'serve to liquidate uncertain actual damages and to encourage victims to bring suit to redress violations.'") (citations omitted).[18]

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[17] Petitioners claim that Congress could not have understood the potential exposure businesses could incur as a result of statutory penalties of $100-$1,000 is contradicted by the legislative history and common sense. When the statutory damages provision was added in 1996, Congress understood that problems with the accuracy of credit information "have been the No. 1 item of complaint at the Federal Trade Commission and States attorneys general have experienced similar levels of complaint." 142 Cong. Rec. S11869 (Sep. 30, 1996). Congress also understood that credit bureaus kept information on "more than 190 million Americans" and that such information was rife with errors. *Id.* In light of the widespread inaccuracies and Congress's understanding of the breadth of the use of consumer information, Congress must have understood the potential scope of liability it created.

[18] *See also Native American Arts, Inc. v. Bundy-Howard, Inc.*, 168 F.Supp.2d 905, 914-15 (N.D.Ill. 2001) (allowing Congress to adjust statutory damages commensurate to public wrong as opposed to private injury "meshes with the ... difficulty in quantifying the amount of actual dam-

(*Footnote continued*)

The liquidated damages in FCRA substitute for actual damages that may be very difficult to prove where the consumer never gets timely notice allowing him to review the same information considered by the insurer when it took the adverse action. Once he belatedly learns of the violation, the consumer may not be able even to locate the same information considered at the time of the adverse action (because credit information is constantly revised), much less determine how any inaccuracy may have impacted the amount charged.

Congress also controls the decision to limit the availability of class actions under any particular federal statute. As Judge Easterbrook has noted, Congress chose to limit class actions under the Truth in Lending Act (TILA) and other federal statutes, but did not do so under FCRA:

> The reason that damages can be substantial [under 15 U.S.C. § 1681n], however, does not lie in an "abuse" of Rule 23; it lies in the legislative decision to authorize awards as high as $1,000 per person, 15 U.S.C. § 1681n(a)(1)(A), combined with GMACM's decision to obtain the credit scores of more than a million persons.
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> Many laws that authorize statutory damages also limit the aggregate award to any class. For example, the Fair Debt Collection Practices Act says that total recovery may not exceed "the lesser of $500,000 or 1 per centum of the net worth of the debt collector". 15 U.S.C. § 1692k(a)(2)(B)(ii). The Truth in Lending Act has an identical cap. 15 U.S.C. § 1640(a)(2)(B) (substituting "creditor" for "debt collector"). *See also* 15 U.S.C. § 1693m(a)(1)(B),12 U.S.C. § 4010(a)(2)(B), and 12 U.S.C. § 4907(a)(2)(B). Other laws, however, lack such upper bounds. See 15 U.S.C. § 1679g(a) (Credit Repair Organizations Act); 15 U.S.C. § 1667d

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ages suffered by any aggrieved plaintiff because of the statutorily defined wrong (a difficulty created by the wrongdoer's own prohibited activity)").

> (Consumer Leasing Act). The Fair Credit Reporting Act is in the cap-free group.
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> Maybe suits such as this will lead Congress to amend the Fair Credit Reporting Act; maybe not. While a statute remains on the books, however, it must be enforced rather than subverted. An award that would be unconstitutionally excessive may be reduced, *see State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), but constitutional limits are best applied after a class has been certified. Then a judge may evaluate the defendant's overall conduct and control its total exposure. Reducing recoveries by forcing everyone to litigate independently-so that constitutional bounds are not tested, because the statute cannot be enforced by more than a handful of victims-has little to recommend it.

Murray v. GMAC Mortgage Corp., 434 F.3d 948, 953-954 (7th Cir. 2006).[19] The excessiveness of any award would only be appropriate for review, as Judge Easterbook noted, should there ever be an aggregate class award following a jury's determination that defendants willfully violated FCRA. The possibility of such an award sheds no light on Congress's intent in using the term "willfully" in FCRA.

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[19] In *Murray*, the Seventh Circuit noted that the 2003 Fair and Accurate Credit Transactions Act ("FACTA") "abolishes private remedies for violations of the clear-disclosure requirement, which in the future will be enforced administratively, but that change does not apply to offers made before its effective date and thus does not affect this litigation." 434 F.3d at 950. FACTA similarly does not apply retroactively here. If the Court now tries to bail out petitioners who cannot avail themselves of FACTA by limiting the notice obligation or changing Congress's definition of willful, that "solution" will apply not only to these defendants, but also to future defendants who are already entitled to FACTA's protection. The result will be to undo the compromise approach taken by Congress of limiting the remedy without eliminating the notice obligation or changing the definition of willful.

F. There Is No Need to Consult Legislative History, But It Supports the Ninth Circuit's Definition of Willfulness.

"When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete." *Connecticut Nat. Bank*, 503 U.S. at 254, *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981). Because the meaning of "willful" is clear from its text and context of FCRA, there is no need to consult FCRA's legislative history.

Petitioners nevertheless argue that Congress must have considered willfulness to require a knowing violation because an initial bill contained a gross negligence standard for actual damages that was later reduced to a simple negligence standard in the enacted statute. Safeco Br. 25-26; GEICO Br. 33. It does not, however, follow that because Congress reduced the standard for actual damages from gross negligence to negligence in Section 1681o prior to enactment, it intended to increase the "willful" standard under Section 1681n to incorporate a knowing standard.[20]

In addition, as the United States' amicus brief points out, while some courts loosely grouped "gross negligence" and "recklessness" together, "most courts consider that 'gross negligence' falls short of a reckless disregard of consequences." U.S. Br. 16 (*quoting* W. Prosser, *The Law of Torts* § 34 at 183 (4th ed. 1971)); *see also Conway v. O'Brien*, 312 U.S. 492, 495 (1941) ("'Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the

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[20] The Conference Report noted that the "the House amendment to section 617, which was agreed to by the conferees would establish liability for actual damages sustained as a result of ordinary negligence, instead of only as a result of gross negligence as provided in the Senate bill." H. Rep. No. 91-1587 at 30 (1970). The political compromise of providing actual damages for negligence did not speak to Congress's intent with respect to willfulness. The Conference Report did not separately discuss willfulness beyond noting that it was the standard for recovering punitive damages under the Act. *Id.*

circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong.'") (*quoting Shaw v. Moore*, 162 A. 373, 374 (Vt. 1932)). There is no evidence in the legislative history that Congress equated "gross negligence" and "recklessness." Even if it did, however, the inference that would be drawn from the change from gross to simple negligence in section 1681o would be that Congress did not want to require plaintiffs to prove recklessness (or something closely approaching recklessness) in order to obtain actual damages, not that it wanted to require *more* than recklessness for the relief available under section 1681n.

GEICO and Safeco also point to alternative bills that proposed providing punitive damages based on either gross negligence or willfulness. H.R. 19403, § 52 , 91st Cong., 2d Sess. (1970); H.R. 19410, § 52, 91st Cong., 2d Sess. (1970). These bills were not considered by Congress; they never received any hearings and were not even reported out of Committee. *See* U.S. Br. 17, n 13. Moreover, these bills would have provided criminal liability for "whoever willfully violates any provision," (H.R. 19403, § 63, 91st Cong., 2d Sess. (1970); H.R. 19410, § 62, 91st Cong., 2d Sess. (1970)), but Congress ultimately added a more specific "knowingly and willfully" requirement to FCRA's criminal sections, indicating that willful violations were not limited to knowing violations. Thus, if anything can be gleaned from the proposed bills, it is that Congress understood that willful violations were not limited to knowing violations.

Safeco also contends that when Congress amended 15 U.S.C. § 1681n(a) to provide statutory damages, it implicitly incorporated four circuit court opinions that purportedly required actual knowledge. Safeco Br. 29. There are two flaws in this argument. First, the term "willfully" has been in section 1681n since FCRA's enactment in 1970, when section 1681n applied only to recovery of punitive damages. In 1996, Congress added new provisions in section 1681n(a)(1)(A) for statutory damages, but made no changes to the willfulness

standard. As of 1970, and continuing through 1996, it was commonplace that plaintiffs could recover punitive damages based on reckless misconduct.[21] Thus, to the extent that the meaning of "willfully" is not apparent from the text and context, the legislative history indicates that the enacting Congress in 1970 would have naturally incorporated the common recklessness standard necessary for punitive damages. *See Dixon v. United States*, 126 S. Ct. 2437, 2445 (2006) (construing statutory liability term "as Congress may have contemplated it" at the time of enactment).

Second, even if 1996 were a relevant date for determining Congress's intent, there was no "unanimous opinion" of circuit courts that rejected recklessness to prove a willful violation under FCRA. Of the four circuit court FCRA cases cited by Safeco on page 29 of their brief, none considers whether recklessness may be sufficient much less reject it for proof of willfulness under Section 1681n. Two, in fact, involve *other* provisions of FCRA that expressly require proof of knowledge.[22] Indeed, there have been only three circuit court cases that have discussed whether recklessness is sufficient to prove a willful civil FCRA violation and all occurred after the 1996 amendment. The Ninth Circuit in this case and the

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[21] *General Motors Acceptance Corp. v. Froelich*, 273 F.2d 92, 94 (D.C. Cir. 1959); *Varnish v. Best Medium Publishing*, 405 F.2d 608, 612 (2d Cir. 1969); *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91, 96 (2d Cir. 1967); *Citizens and Southern Nat. Bank of S.C. v. Dickerson, Inc.*, 370 F.2d 692, 696 (4th Cir. 1966); *Anderson v. Eagle Motor Lines, Inc.*, 423 F.2d 81, 84 (5th Cir. 1970); *Memphis Press-Scimitar Co. v. Chapman*, 62 F.2d 565, 567 (6th Cir. 1933); *Bucher v. Krause*, 200 F.2d 576, 584-85 (7th Cir. 1953); *Harrison v. Donnelly*, 153 F.2d 588, 591 (8th Cir. 1946); *Lampert v. Reynolds Metals Co.*, 372 F.2d 245, 247-48 (9th Cir. 1967); *Newman v. Nelson*, 350 F.2d 602, 604 (10th Cir. 1965).

[22] *See e.g., Zamora v. Valley Fed. Sav. & Loan Ass'n of Grand Junction*, 811 F.2d 1368, 1370 (10th Cir. 1987) (applying 15 U.S.C. § 1681q); *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 971-72 (4th Cir. 1987) (applying 15 U.S.C. § 1681q standard where a consumer report was obtained under false pretenses).

Third Circuit have permitted the use of recklessness to prove a willful violation under 1681n(a)(1)(A). GEICO Pet. App. 34a; *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997). The Eighth Circuit criticized the use of the reckless disregard standard in *dicta*, but this was not surprising because it ultimately concluded that the claim at issue arose under 15 U.S.C. §§ 1681n(a)(1)(B) and n(b), which expressly require proof of "knowingly" obtaining a consumer report without a permissible purpose. *Phillips v. Grendahl*, 312 F.3d 357, 365 (8th Cir. 2002); *but see Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998) (allowing punitives under FCRA for "trampling recklessly" on plaintiff's rights).[23]

In short, if there were any need to resort to legislative history, nothing in the history suggests Congress intended "willfully" to mean something different in FCRA than in other statutes, such as the ADEA and FLSA, which were enacted during the same period. *Northcross*, 412 U.S. at 428 (construing terms in similar statutes to have the same meaning).

G. The Rule of Lenity Does Not Apply.

Petitioners' reliance on the "rule of lenity" to bootstrap a civil willfulness standard into a higher criminal standard is unavailing. First, the rule of lenity applies only to interpretation of ambiguous statutes and, therefore, has no application here. *Bates v. United States*, 522 U.S. 23, 32-33 (1997); *Beecham v. United States*, 511 U.S. 368, 374 (1994). Indeed, this Court typically requires more than just "some" ambiguity to invoke the rule:

> The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. ("The mere possibility of articulating a narrower construction ... does not by itself make the rule of lenity

[23] Safeco also claims Congress adopted *dicta* from additional cases regarding the willfulness when enacting FACTA in 2003, but FACTA did not amend section 1681n or make any reference to willful violations.

> applicable"). "The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' ... we can make 'no more than a guess as to what Congress intended.'" To invoke the rule, we must conclude that there is a "'grievous ambiguity or uncertainty' in the statute."

Muscarello v. United States, 524 U.S. 125, 138 (1998) (citations omitted). In light of the text, context and prior case law interpreting the term willful in similar civil statutes, it cannot be said that the term is so ambiguous that this Court can only hazard a guess at Congress's intent.

Second, as Safeco concedes, the rule of lenity typically applies to criminal statutes. Safeco Br. 35 (citing *McNally v. United States*, 483 U.S. 350, 359-360 (1987)). Civil consumer protection statutes such as FCRA, by contrast, are generally construed broadly rather than narrowly. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1332 (9th Cir. 1995). Hence, the usual "recklessness" civil standard should apply. In *Thurston*, this Court noted that even the *criminal* provisions of the FLSA incorporated the standard of recklessness that the Court applied to the civil ADEA provisions before it. 469 U.S. at 126 (*quoting Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir), *cert. denied*, 342 U.S. 876 (1951)). Far from invoking the rule of lenity to apply a heightened criminal state-of-mind standard to a civil damages provision, as petitioners attempt, this Court in *Thurston* found a recklessness standard appropriate for *both* civil and criminal liability. 469 U.S. at 126.

GEICO cites one civil case in which this Court invoked the rule of lenity: *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992). In *Thompson/Center Arms*, the Court addressed an ambiguity over what it meant to "make" a "firearm." *Id.* at 513. Although the statute before it was civil, the court looked to the rule of lenity because the same conduct also carried criminal penalties with no additional scienter requirement; thus, the court's construction of the civil statute would also set a standard for criminal liabil-

ity in other cases. *Id.* at 518. Here, by contrast, the criminal provision has a separate and higher scienter requirement, requiring "knowing and willful" violation. 15 U.S.C. § 1681q. The rule of lenity is neither necessary to address any ambiguity nor to ensure a higher criminal scienter standard because that higher criminal standard already exists in FCRA.

H. The Ninth Circuit's Recklessness Standard Is Consistent With Established Tort Law and Properly Invites Inquiry Into Both Subjective and Objective Factors.

1 The Ninth Circuit's *dicta* regarding a potential advice of counsel defenses does not compel petitioners to invoke the defense.

Petitioners wrongly contend that the Ninth Circuit compelled them to raise the advice of counsel defense. GEICO Br. at 44-45; Safeco Br. at 42. The advice of counsel issue is a red herring as no advice of counsel appears in the factual record. In fact, GEICO and Safeco chose not to share their counsel's advice in opposing summary judgment and have made a tactical decision not to share that advice to this day. That is their choice. Respondents have never taken the position that petitioners must waive the privilege and provide evidence of counsel's advice in connection with respondents' affirmative case, but petitioners clearly may choose to offer the advice as part of any defense.

The Ninth Circuit also did not compel petitioners to waive the privilege, but merely stated, in *dictum*, that "in some cases" whether or not there is a finding of willfulness "may depend, in part, on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." GEICO Pet. App. 34a. This *dictum* was a direct response to GEICO's conclusory statements, unsupported by evidence, that it relied on

advice of counsel.[24] Petitioners similarly argue to this Court, again without record support, that they have acted in reliance on counsel. *E.g.*, GEICO Br. 48 (asserting without record citation that its interpretation of FCRA was "produced with the assistance of reputable counsel"); Safeco Br. 42 (falsely implying that the Ninth Circuit erred in rejecting Safeco's advice of counsel defense).

The Ninth Circuit's observation that a fact finder may determine willfulness based on the subjective intent of executives and on any legal advice offered (where the defendant chooses to inject legal advice into the case) is hardly extraordinary. *See American Med Sys Inc. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1531 (Fed. Cir. 1993) (discussing advice of counsel as relevant factor in proving willful patent infringement); *United States v. Wenger*, 427 F.3d 840, 853 (10th Cir. 2005) (discussing same in cases involving willful violation of federal securities laws). Nor is there anything erroneous in the Ninth Circuit's statement that conferring with counsel "may provide evidence of lack of willfulness, but is not dispositive." GEICO Pet. App. 34a. Indeed, that statement was an apt response to GEICO's self-serving affidavit in the summary judgment record that it had consulted with counsel about FCRA compliance, but not saying when the consultation took place, what facts were disclosed to counsel, or what

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[24] *See e.g.*, GEICO JA 22, ¶19. In addition, GEICO petitioned for reconsideration and argued, without factual support, that there was "no evidence" that GEICO "sought anything but sound, objective advice from its legal counsel regarding undecided legal questions." Appellees' Petition for Panel Rehearing and Rehearing En Banc (Ninth Cir. Case No. 04-35279), 11. The Ninth Circuit denied reconsideration, but added *dicta* regarding advice of counsel to leave open the possibility that petitioners could assert the defense on remand. Following remand from the Ninth Circuit, petitioners indicated that they would raise the defense, but they have not yet come forward with the advice on which they rely because the proceedings are stayed pending this Court's decision.

counsel's advice was.[25] GEICO JA 22, ¶ 19. It is well settled that merely referring to the fact that defendant consulted counsel cannot defeat a finding of willfulness. *Amsted Indus. Incorp*, 24 F.3d at 182. *See also Padilla v. Metro-North Commuter Railroad*, 92 F.3d 117, 124 (2d Cir. 1996) (holding that "the mere fact that Nelson may have consulted with Metro-North's legal department does not demonstrate that he acted in good faith[.]"); *Takecare Corp. v. Takecare of Oklahoma, Inc.*, 889 F.2d 955, 957-58 (10th Cir. 1989) (holding same); *United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992) (holding same).

To establish good faith reliance on counsel, defendants must show "(1) a request for advice of counsel on the legality of a proposed action, (2) full disclosure of the relevant facts to counsel, (3) receipt of advice from counsel that the action to be taken will be legal, and (4) reliance in good faith on counsel's advice." *Wenger*, 427 F.3d at 853. "[G]ood faith reliance on the advice of counsel, even when those factors are met, is not a complete defense to an allegation of willful misconduct, but is merely one factor a jury may consider when determining [defendant's] state of mind." *United States v. United Med. and Surg. Supply Corp.*, 989 F.2d 1390, 1403 (4th Cir. 1993); *see also United States v. Dardi*, 330 F.2d 316, 326 (7th Cir. 1964) (holding same). Even where these factors are met, the fact-finder may inquire into the quality of the advice received to determine whether a defendant's reliance was, in fact, in good faith. *Liquid Dynamics Corp. v. Vaughan Co., Inc.*, 449 F.3d 1209, 1226 (Fed. Cir. 2006).

Safeco goes even further and argues that the Ninth Circuit erred in its "refusal to recognize a complete advice-of-counsel defense" and exhibited a "presumption of bad faith

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[25] Among the information not provided by GEICO is whether the purported advice was received before or after GEICO's actions, or even whether it predated the litigation. An opinion obtained after the fact is irrelevant to willfulness. *Amsted Indus. Incorp. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 182 (Fed. Cir. 1994).

on the part of lawyers and clients that is unprecedented in the decisions of this Court and unwarranted as a matter of principle and policy" (Br at. 43). Safeco's argument is peculiar because (1) Safeco made no effort to raise the defense or offer advice of counsel in the lower courts; (2) Safeco cites no case where this Court or any court has recognized "a complete advice-of-counsel" defense; (3) it is commonplace that advice of counsel may be a factor considered in refuting, but not wholly negating, willfulness; and, (4) the Ninth Circuit merely (a) remanded the case for further consideration should Safeco choose to try to later raise such a defense and (b) compelled no inquiry into any advice of counsel. Petitioners' arguments that the Ninth Circuit compelled inquiry into advice of counsel or "presumed" bad faith are baseless.

Petitioners' reliance on *Thurston's* discussion of TWA's reasonable conduct and good faith is also misplaced. In *Thurston*, TWA presented substantial evidence of its attempts to comply with the ADEA immediately after its passage by designing a new retirement policy that complied almost fully with the Act. This evidence included TWA's consultations with attorneys *before* the unintentional violative conduct and changes in TWA's retirement policy as *a direct result* of that legal advice that brought TWA into substantial compliance with the ADEA for almost all of its personnel. 469 U.S. at 129-130. This Court concluded that TWA had merely "failed to focus specifically on the effect of each aspect of the new retirement policy for cockpit personnel." *Id* at 130.

In contrast to *Thurston*, petitioners do not cite any specific legal advice or explain its impact on their conduct. Nor did petitioners merely overlook a small subset of persons in an otherwise good faith attempt to comply with FCRA. Petitioners' intentional conduct removed most initial applicants from the protections of FCRA, thousands of consumers who were otherwise clearly covered by FCRA's plain terms. Further, while *Thurston* found no evidence of knowledge or recklessness, there is such evidence of petitioners' knowing or reckless conduct, as discussed in section III below.

2. The Ninth Circuit properly rejected a negligence standard.

The Ninth Circuit adopted a clear and common standard for a willful violation:

> We hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights of others or in reckless disregard of whether the policy [or action] contravened those rights."
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> . . .
>
> In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. 1681n for willfully violating consumers' rights.

GEICO Pet. App. 31a, 34a (*quoting Cushman*, 115 F.3d at 227). By specifically relying on this Court's opinions rejecting a negligence standard to define willfulness, the Ninth Circuit made clear that its recklessness standard required more than negligence. GEICO Pet. App. 32a (*citing Hazen Paper*, 507 U.S. at 614 and *McLaughlin*, 486 U.S. at 134). The district court on remand could not possibly interpret the Ninth Circuit opinion to permit a negligence standard.

Despite this, petitioners and the United States selectively take words such as "reasonableness," "untenable," and "implausible" out of context to argue that the Ninth Circuit approved a negligence standard. The Ninth Circuit's descriptions of the types of highly unreasonable conduct that may satisfy a recklessness standard, however, is fully consistent with conventional definitions of recklessness. For instance, the court stated that "whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation." GEICO Pet. App. 34a. In stating that recklessness is dependent "in

part" on the *degree* of "unreasonableness" of the interpretation, the Ninth Circuit in no way stated that an interpretation that was merely unreasonable, but not reckless, constituted willfulness. It clearly rejected that position. GEICO Pet App 31a and 34a. Of course, an interpretation that is highly unreasonable at some point passes into recklessness and tort law defines recklessness based on this continuum:

> The usual meaning assigned to "willful," "wanton" or "reckless," according to taste as to the word used, is that the actor has intentionally done an act of *an unreasonable character* in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.
>
> . . .
>
> The result is that "willful," "wanton," or "reckless" conduct tends to take on the aspect of *highly unreasonable conduct*, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.

W. Prosser, *Law of Torts* § 34, at 185 (4th Ed. 1971) (emphasis added); *Prosser and Keeton on Torts* § 34, at 213-214 (5th Ed. 1984) (same); *cf. Carter v. Chicago Police Officers,* 165 F.3d 1071, 1081 (7th Cir. 1998) ("although a litigant could soundly argue that willful and wanton conduct should be considered unreasonable, the inverse is not necessarily true."). Taking words such as "unreasonable" or "implausible" out of context from the sentences in which they are used does not convert the Ninth Circuit's holding into adoption of a lower negligence standard.

The United States' proposed definition of "recklessness," in fact, differs from the Ninth Circuit's largely in the occasional use of different words that have nearly equivalent meaning. The United States observes that recklessness involves inquiry into whether there was an "obvious risk of unlawfulness" or conduct "outside the range of responsible

judgment" (U.S. Br. 23) while the Ninth Circuit similarly concludes that the decision "may depend in part on the obviousness or unreasonableness" of the erroneous interpretation and whether it reflects an "*implausible*" interpretation of the law. (GEICO Cert. Pet. 34a). The Ninth Circuit should not be faulted nor its decision vacated for occasionally choosing different adjectives to help describe the same standard.

Petitioners also inaccurately contend that the Ninth Circuit has prevented them from raising their good faith and purportedly reasonable attempts to follow FCRA. The Ninth Circuit directly stated that a company will *not* have acted recklessly if "it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has come to a tenable, albeit erroneous interpretation of the statute." GEICO Pet. App. 34a. Petitioners may provide evidence of such efforts on remand, but are not entitled to a presumption of good faith based solely on their legal arguments or vague and conclusory references to consulting "reputable" counsel (while hiding the actual advice given, the scope of engagement, and the conduct taken in response to that advice).

3. The Ninth Circuit properly invited the district court to consider subjective and objective factors on remand.

The Ninth Circuit properly stated that the district court on remand could consider both subjective and objective factors to determine whether there is a triable issue of fact as to willfulness. GEICO Pet. App. 34a. It is established tort law that proof of willfulness may include consideration of both subjective and objective factors. *Prosser and Keeton on Torts*, § 34 at 213-214 (5th Ed. 1984).

Proof that a defendant *knew* its conduct violated the law or *understood* that it was acting in the face of a substantial risk that its conduct violated the law obviously necessitates inquiry into the defendant's state of mind. *Farmer v. Brennan*, 511 U.S. 825, 838 (1994). These questions of "knowledge and belief are characteristically questions for the fact

finder, in this case the jury." *Cheek v. United States*, 498 U.S. 192, 203 (1991). "Willfulness is a question of fact for the jury, raising, as it does, issues of the employer's knowledge and understanding of the relationship between certain conduct and the legal requirements of the ADEA." *United States E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1250 (11th Cir. 1997).[26] Even in those limited cases where this Court has required proof of subjective, as opposed to objective, recklessness, a factfinder may infer from circumstantial evidence that a defendant had subjective knowledge of the high risk that his conduct violated others' rights based solely on the *obviousness* of the risk involved. *Farmer*, 511 U.S. at 842; *Herbet v. Lando*, 441 U.S. 153, 156-57 (1979). And even where a subjective standard applies, a defendant's conduct need not be "egregious" or "outrageous" (i.e., objectively extreme) if defendant acted with a reckless disregard of the law—that is, acted in the face of a "perceived risk" that its conduct violated the law. *Kolstad*, 527 U.S. at 536-37.

In civil tort actions, a plaintiff may also, in the alternative, prove willfulness or recklessness by demonstrating that a reasonable person in defendant's place would have been aware of an objectively high risk that its conduct violated the statute. *Farmer*, 511 U.S. at 838, *citing Prosser and Keeton on Torts*, § 34 at 213-214 (5th Ed. 1984). As Prosser explains, it is rare that a civil defendant will admit it understood its conduct violated the law, and evidence of such intent is typically based on inference:

> Since, however, it is almost never admitted and can be proved only by the conduct and its circumstances, an objective standard must of necessity in practice be ap-

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[26] *See also Hoechst Celanese Corp. v. BP Chemicals Ltd.*, 78 F.3d 1575, 1583 (Fed. Cir. 1996) ("[T]he issue of willfulness of wrongdoing is a question of fact, and was presented to the jury for decision."); *Smith v. Chase Group, Inc.*, 354 F.3d 801, 809 (8th Cir. 2004) ("The issue of willfulness is a question of fact to be determined by the jury.")

> plied. The 'willful' requirement, therefore, breaks down and receives at best lip service, where it is clear from the facts that the defendant, whatever his state of mind, has proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position . . . Reckless conduct takes on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care where a high degree of danger is apparent.

Prosser and Keeton on Torts, § 34 at 214. Similarly, in *Hazen Paper*, this Court noted that the "an employer's reluctance to acknowledge" unlawful conduct "should not cut against imposing a penalty," but that statutory damages may be imposed where "the employer more likely knows its conduct to be illegal." *Hazen Paper*, 507 U.S. at 617. Thus, a finding of willfulness may be based either on proof of subjectively knowing or reckless conduct, which a factfinder may infer from the obviousness of the risk of the violation, or, in the alternative, on objective factors showing that a reasonable defendant would have been aware of a high risk that its conduct violated the law.

Petitioners and the United States, however, argue that this Court must apply some objective standard, not as an alternative to inquiry into subjective knowledge or recklessness, but as a complete legal defense and a shield to *prohibit* inquiry into petitioners' subjective awareness or conduct reflecting on recklessness (e.g., petitioners' failure to follow FTC guidelines or even make an inquiry to the FTC to seek guidance on their illegal conduct). Petitioners and the United States inaptly rely on cases where courts presume the defendant's *immunity* and prevent subjective inquiry unless defendant has taken an "objectively baseless" litigation position. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (involving *Noerr-Pennington* antitrust immunity that can only be overcome by showing that a lawsuit was a "sham," meaning objectively baseless). The United States also relies on the qualified im-

munity standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), under which, for policy reasons including the need to avoid "excessive disruption of government," *id.*, government officials may not be held individually liable for damages unless their conduct violated clearly established law. *See also Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (*Harlow* immunity balances conflicting policies designed to protect government officials from "substantial social costs," including eliminating the risk that "fear of personal monetary liability and harassing litigation will unduly inhibit officials.").[27]

Civil defendants in common law and statutory tort cases are not given presumptions of immunity or similar policy protections that prevent inquiry into subjective intent. Here, a factual inquiry into defendant's intent and state of mind is at the heart of the proof of plaintiffs' affirmative case. It would be particularly unusual to prevent that inquiry where, as here, there is already substantial evidence that petitioners subjectively understood the substantial risk that their conduct violated the law. *See* Sec. III, *infra*. The immunity cases relied upon by the United States cannot prevent inquiry into respondents' subjective intent.

Even if purely objective factors could be used as a shield to prevent further inquiry into subjective intent, petitioners' litigation arguments are not objectively reasonable as a matter of law such that no reasonable juror could conclude that they did not recklessly violate FCRA. *See* Sec. III, *infra*.[28]

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[27] The federal qualified immunity standard, which is designed to *avoid* inquiry into defendant's subjective state of mind, provides a particularly poor analogy to a "willfulness" standard. By contrast, under state law immunity doctrines that turn on subjective factors such as willfulness or malice, "whether or not an officer acted willfully or maliciously is usually a question of fact to be resolved by the jury." *Craighead v. Lee*, 399 F.3d 954, 963 (8th Cir. 2005) (applying Minnesota immunity law); *Carter*, 165 F.3d at 1081 (7th Cir. 1998) (applying Illinois immunity law).

[28] GEICO argues that other insurance defendants, such as Hartford Fire and State Farm, concluded that the "adverse action" provisions did not apply to initial applications for insurance. GEICO Br. at 48, n 29, but this

(*Footnote continued*)

Indeed, the United States agrees that GEICO's interpretation of the "adverse action" provision "defies the statutory text and purpose." U.S. Br. 27. It concludes that "[b]y the statute's plain terms" GEICO took an adverse action against respondent Edo. *Id.* Oddly, the United States inconsistently argues that GEICO is entitled to a judgment as a matter of law without further inquiry into its subjective intent, even though the evidence presented below and that may be presented on remand confirms that GEICO understood at the time that it was taking "adverse actions" against consumers without notice and the FTC had, in fact, warned the industry about the very violations at issue in these cases.

The United States paradoxical position rests on the suggestion that a statute must be "pellucid," as opposed to merely plain on its face, and perhaps must be subject to prior court interpretation for any defendant to willfully violate it. U.S. Br. 29.[29] This view would give defendants' license to willfully violate any statute that has not been subject to prior interpretation and whose terms are clear, but not "pellucid."[30]

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assertion is not supported by the record in those cases. For instance, the record in *Hartford Fire* indicates that Hartford believed that it had to provide notice to initial applicants and actually did send a form of notice, albeit an inadequate one that did not mention that Hartford had taken any adverse action. *Hartford Fire Ins. Co. v. Reynolds*, No. 06-82. Hartford has settled its case and is awaiting approval of the class settlement.

[29] To the extent the United States argues that GEICO may reasonably have misunderstood the term "increase" in 15 U.S.C. § 1681a(k)(1)(B)(i), there is clearly no possibility that GEICO misunderstood the word "denial" in the same statute. It is undisputed that GEICO General denied Edo insurance based on review of his credit information. GEICO JA 80.

[30] In a similar vein, GEICO argues that punitive damages are not available if a legal theory is "novel or poorly recognized." GEICO Br. at 44, *citing Kolstad v. American Dental Ass'n*, 527 U.S. 526, 537 (1999). There is no issue of punitive damages in this case. Even if there were, *Kolstad* does not stand for a per se rule that prohibits a jury from considering defendants' knowledge or recklessness or removes this issue from a jury's consideration. *Kolstad* only states in *dicta* that a defendant *may* not be aware or reckless in its violation if the legal theory is novel (527 U.S.

(*Footnote continued*)

Such a novel approach would give license to GEICO and Safeco to willfully violate the statute even though (1) the FTC staff specifically instructed the insurance industry to provide notice to initial insurance applicants who did not get the lowest rate offered based on their credit score; (2) there was existing case law applying FCRA's adverse action provisions to other initial consumer transactions (*Mick v. Level Propane Gasses, Inc.*, 1999 WL 33453772 at *12 (S.D. Ohio 1999)); and (3) there is evidence that petitioners understood that they were taking adverse actions against consumers. *See* Sec. III, infra.

While there may be statutes that no reasonable person could understand or follow, the "adverse action" provision of FCRA, as demonstrated by the United States' own concise statutory analysis, is not one of them. Further, even if that the statute were not clear or subject to prior interpretation, the FTC has created a mechanism by which companies that genuinely sought to comply with the law could obtain guidance. Under 16 C.F.R. § 1.1:

> (a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, where practicable, under the following circumstances.
>
> (1) *The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent*; or
>
> (2) The subject matter of the request is of significant public interest.

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at 537), but that is an issue of fact typically addressed by the jury. Respondents do not contest that petitioners can present facts to the jury that they tried to comply in good faith with FCRA, but this is an issue of fact.

> (b) The Commission has authorized its staff to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted.

(Emphasis added.) A defendant is not subject to an FTC enforcement action if it acted in "good faith reliance on the Commission's advice under this section." 16 C.F.R. § 1.3. When Trans Union, a supplier of credit information, similarly argued that FCRA was too vague to be applied, the D.C. Circuit rejected the argument on the ground that Trans Union could have availed itself of 16 C.F.R. § 1.1 if it had any issue about the clarity of FCRA. *Trans Union Corp. v. Federal Trade Cmm'n*, 245 F.3d 809, 817 (D.C. Cir. 2001).[31] Thus, even if petitioners were unsure of the application of FCRA, they had an opportunity to seek clarification, but recklessly chose not to do so. Indeed, when Mr. Ball asked the FTC for such advice, the FTC advised insurance companies that failing to give an initial applicant the best available price based in part on credit is an adverse action. FTC Ball Letter. Petitioners also recklessly ignored this guidance.

Of course, petitioners remain free to argue on remand that the statute's text and the available guidance did not give them enough reason to believe they were violating the FCRA to render their conduct willful, but these are fact issues for a jury, not questions of law for this Court. *Farmer*, 511 U.S. at 842; *Cheek*, 498 U.S. at 203.

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[31] Even in criminal cases, where the vagueness standard is more protective of defendants, a statute is valid unless it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997). With all due respect to the district court, whose analysis ignores the plain text of the statute, FCRA is not a statute so vague that petitioners were left guessing at its meaning. Indeed, they did not have to guess because the FTC had already guided them on the appropriate answer.

II. GEICO TOOK AN ADVERSE ACTION AGAINST EDO UNDER THE PLAIN TEXT OF 15 U.S.C. § 1681a(k)(1)(B)(i).

The Ninth Circuit correctly concluded that GEICO and GEICO General took an adverse action against Edo under 15 U.S.C. § 1681a(k)(1)(B)(i) when they denied Edo insurance with GEICO General based in part on a review of his credit information. GEICO Pet. App. 28a-29a. Under section 1681a(k)(1)(B)(i), an adverse action includes a "denial . . . of any insurance[.]" Under section 1681m, if a person takes such "adverse action . . . based in whole or in part on any information contained in a consumer report," it must provide notice. It is undisputed that Edo was denied insurance with GEICO General based on a review of *his* credit information. Had Edo had better credit, GEICO would have insured him within GEICO General. GEICO JA 80.

According to GEICO's argument, GEICO only had to give notice if it would not also have denied Edo insurance if he had another hypothetical consumer's purportedly neutral or average credit score. GEICO's argument cannot be squared with either the words "denial . . . of any insurance" in section 1681a(k)(1)(B)(i) or the words "based . . . in part on any information contained in a consumer report" in section 1681m. FCRA requires notice if there was an "adverse action" taken based on a review of *Edo's* credit information in connection with the underwriting of *his* insurance regardless of how GEICO might have treated a different consumer with a hypothetically neutral or average credit score. 15 U.S.C. § 1681a(k)(1)(B)(i), 1681m. Regardless of this Court's ultimate interpretation of "increase" in section 1681a(k)(1)(B)(i), this Court should affirm the Ninth Circuit's conclusion that Edo suffered an adverse action when he was "denied" insurance with GEICO General based on a review of his credit information. There is no possible ambiguity with respect to the words "denial . . . of any insurance."

GEICO's tortured argument perversely permits GEICO General to review *any* consumer's credit file, reject him as a

result and *never* provide notice to a single consumer because GEICO General *only* provides the lowest cost insurance to consumers with better than average credit. GEICO's policy of providing notice only to consumers treated worse than they would have been treated if their credit scores were "neutral" will never result in notice to consumers denied coverage by GEICO General, because GEICO General does not insure consumers with average credit.[32] Congress could not have intended this absurd result when it gave companies like GEICO General the privilege to review confidential credit information with the associated responsibility to give notice when they used the information against consumers.

For the same reason, the Ninth Circuit also correctly concluded that GEICO took an "adverse action" under section 1681a(k)(1)(B)(i) when it "increased" Edo's charge for insurance by denying him access to the lowest cost carrier and placing him in the more expensive company GEICO Indemnity based on review of his credit information. GEICO Pet. App. 20a-21a. An adverse action under section 1681a(k)(1)(B)(i) includes "an increase in any charge for . . . any insurance . . . applied for, in connection with the underwriting of insurance." GEICO had to provide notice to Edo if this increase was made "based in whole or in part" on any information in Edo's credit report. 15 U.S.C. § 1681m(a). In connection with underwriting Edo's insurance, GEICO increased his charge for insurance based in part on review of his credit information. This is an "adverse action" under section 1681a(k)(1)(B)(i). This is also the common understanding of "increase" used in similar consumer credit notice statutes. *See Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001) (holding that charging a buyer of a car more

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[32] The Ninth Circuit correctly concluded that if a consumer would not have qualified for GEICO General even with the top credit score (for example, because his driving record disqualifies him), he has not suffered an adverse action based in part on credit. GEICO Pet. App. 21a, n 11.

if he pays with credit is an "increase" triggering TILA's disclosure requirements).

In addition, the FTC had specifically instructed insurance companies that an adverse action includes not offering the lowest rate to an *initial* applicant based on their credit score or not providing a discount available to other applicants with higher credit scores. FTC Ball Letter; *see also* 16 C.F.R. Part 601, Appendix C (stating that "'adverse action' is defined very broadly . . . and includes all business, credit and employment transactions affecting consumers that can be considered to have a negative impact").

GEICO argues that it did not take an "adverse action" against Edo because he would have been charged the same amount if his credit had not been considered and he was assigned a "neutral" credit score. As the United States notes, this argument is beside the point because GEICO had *already* used Edo's credit information against him by placing him in the more expensive carrier. U.S. Br. 26. FCRA requires notice when credit information is used "in connection with the underwriting of insurance" (15 U.S.C. § 1681a(k)(1)(B)(i)) and does not ask how consumers would have been treated if their credit information had *not* been used.

GEICO's argument not only contradicts the plain statutory text, but eviscerates the statute's stated purpose to ensure that businesses use accurate credit information in transactions with consumers. 15 U.S.C. § 1681(a)(1), (b). GEICO's strange interpretation *presumes* that it uses accurate credit information when underwriting a consumer's insurance. If a consumer's true credit information would qualify her for the lowest cost insurance, but GEICO has obtained inaccurate or dated information or information on another consumer due to identity theft, mistake or otherwise, GEICO will not provide notice if the consumer's placement or charge for insurance is no worse than the average consumer's placement or charge. Thus, GEICO can treat consumers adversely without providing notice even when they, in *fact*, qualify for the lowest rate. This practice eliminates FCRA's system of notice and checks

and balances, which allows consumers to confirm that the insurer is using *their* information (and not another consumer's credit information or credit scores driven down by identity theft) and that such information is accurate. As the United States amicus brief concludes, GEICO's argument defies the plain text and purpose of the statute.[33] U.S. Br. 27.

This Court need only review the text, context, and stated statutory purpose of FCRA to conclude that GEICO took an adverse action. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000). However, should it choose to review legislative history, the history supports the Ninth Circuit's holding with respect to the meaning of "increase." The Senate Report accompanying FCRA's original enactment stated that notice was required when a consumer was charged "higher rates" based on a review of that consumer's credit information. *See* S. Rep. No. 91-517, at 7 (1969) (providing that "those who reject a consumer for credit, insurance or employment or who charge a higher rate for credit or insurance wholly or partly because of a consumer report must . . . so advise the consumer[.]") When Congress added the specific definition of "adverse action" in 1996, it not only provided that "adverse action" included an increase of the charge for insurance based on credit information, but also stated that an adverse action occurred whenever any "outcome adverse to the interests of the consumer" followed a review of credit information. 15 U.S.C. §

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[33] The United States is even more dismissive of Safeco's argument that FCRA does not apply to increases in connection with initial insurance applications: Its brief dryly states that GEICO's concession that FCRA does apply to initial applications "was a wise one." U.S. Br. 25. Safeco, while trying to argue the issue in its merits brief, did not present the question in its petition for certiorari. Moreover, this Court has not granted certiorari on other petitions arising from the Ninth Circuit's decision that did present the initial application question. *See, e.g.*, State Farm Mutual Automobile Insurance Co's Petition for a Writ of Certiorari, No. 06-101. Safeco's argument that the statute does not apply to initial applications is not properly before this Court.

1681a(k)(1)(B)(iv)(II); S. Rep. No. 103-209 at 4, 8 (1993); H. Rep. No. 103-486 at 26 (1994). The legislative history also makes clear that Congress from the very inception of FCRA wanted to ensure that every consumer had the right to check to ensure that accurate information was being used against him in consumer transactions. 115 Cong. Rec. 33413 (Nov. 6, 1969) (Senator Bennet stating "I believe that every consumer is entitled to have the benefit of accurate information when decisions are made regarding his purchase of insurance, his employment, or the granting of credit to him.") The Ninth Circuit's definition of "adverse action" is consistent with Congress's intent that the term be interpreted broadly to include any negative impact on the consumer and to ensure that consumers have the opportunity to check if accurate credit information is being used against them.

GEICO relies on subsequent legislative text and history relating to the *separate* credit provisions of FCRA to contend that Congress did not intend to provide notices to consumers who did not receive the lowest cost insurance based on their credit information. *See* GEICO Br. 20-22, 23 (referencing testimony of FTC in connection with 2003 amendments to credit provisions of FCRA). The separate notice provisions for offers of credit have no application here.[34] In 2003, Con-

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[34] GEICO misleadingly cites testimony by FTC staff members that the FTC was concerned in 2003 about providing notices to too many people because not everyone has the best credit. *See* GEICO Br. 23. The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs, 108th Cong. 529 (2003) at 528-529. This testimony was given in connection with 2003 FACTA amendments that changed the "adverse action" definition only with respect to credit. In fact, FTC staff member Joel Winston acknowledged in the same testimony in response to a question from Senator Sarbanes regarding whether a consumer should be provided notice if they did not get the lowest interest rate offered by a bank that "[u]nder current law, it would require an adverse action notice if you got less favorable terms unless there were a counteroffer that you accepted in the credit situation." *Id.* at 528.

gress amended 15 U.S.C. § 1681m(h) to provide solely for credit transactions, and not insurance, that when a creditor grants credit on "terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers," that creditor must provide the consumer with a so-called "risk-based pricing notice" that is defined by FCRA and implementing regulations. As the FTC explained to the Ninth Circuit, these amendments were necessary because of the more limited definitions of "adverse action" that applied to offers of credit before 2003. *See* FTC Amicus Brief in *Spano v. Safeco*, No. 04-35313 (9th Cir.), at 27, n 14. "Because . . . the FCRA contains a much broader definition of adverse action in the context of insurance transactions, no similar amendment to expand that definition was necessary." *Id.* If anything, Congress's decision to *expand* the definition of adverse action for credit transactions in 2003 to bring it closer to the expansive definition already applicable to insurance transactions[35] confirms the correctness of the Ninth Circuit's ruling. In any event, Congress's decision not to touch the definition applicable to insurance transactions while altering the definition for credit transactions suggests that Congress did not intend to affect the definition of "adverse action" in connection with initial insurance applications.[36]

Finally, GEICO says providing notice would require "almost metaphysical abstraction." On the contrary, explaining the "adverse action" would require one simple sentence:

> Dear Insurance Applicant: Based on a review of your credit information, you were denied insurance with

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[35] Even if the standard applicable to credit transactions did apply here, GEICO's treatment would still be "adverse" because GEICO treated Edo less favorably than a substantial number of customers whom it places with GEICO General.

[36] GEICO also relies on separate text and legislative history relating to the use of consumer reports in reviews of existing accounts and in so-called "pre-screened" offers. *See* 15 U.S.C. § 1681a(l) and 1681a(m). Neither provision is at issue here.

> GEICO General, our preferred insurer that offers the lowest rates, and you were then placed in a more expensive policy with GEICO Indemnity.[37]

It would then be up to the consumer to determine whether GEICO consulted accurate credit information or what would be necessary to obtain the lower rate. GEICO's contentions that such notices will only confuse consumers and that their effect would be diluted by a tidal wave of notices did not prevent GEICO from sending revised adverse action notices to all consumers who did not get the best available rate due to credit starting in December 2002. GEICO JA 42, 48-49.

III. THIS COURT SHOULD REMAND THESE CASES TO ALLOW CONSIDERATION BY THE DISTRICT COURT OF A COMPLETE FACTUAL RECORD.

This Court should affirm the Ninth Circuit's judgment to remand these cases to the district court to apply the willfulness standard to a more developed factual record, now including consideration of documents that GEICO belatedly produced after summary judgment. Petitioners ask this Court to be the first court to rule on their summary judgment motion on the issue of willfulness and the first to consider any factual record. Because the district court ruled on other substantive issues and did not rule on the willfulness issue (*See* Safeco Pet. App. 22a, n5; GEICO Pet. App. 44a-47a), it is appropriate for that court to do so in the first instance. Further, petitioners did not seek certiorari on the question of application of the legal standard to the facts, but only asked this Court to define the standard for willfulness, and, in GEICO's case, to determine whether Edo's treatment constituted an adverse action. GEICO Cert. Pet. at i; Safeco Cert. Pet. at i.

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[37] 15 U.S.C. § 1681m(a)(2), (3) provide other specific requirements for the "adverse action" notice, including, among other things, information regarding the consumer reporting agency and its role in the process and the consumer's right to obtain a free credit report to review the information used.

If this Court nevertheless decides to be the first to rule on petitioners' summary judgment motion and apply the willfulness standard to the as-yet not fully developed factual record, this Court should deny petitioners' request for summary judgment. The issue of willfulness is traditionally a fact issue to be resolved by the jury. *Cheek*, 498 U.S. at 203; *Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d at 1250. Giving respondents the benefit of all inferences, there are disputed issues of fact that prevent summary judgment. A reasonable juror could conclude based on the totality of circumstances that petitioners were either subjectively aware of FCRA's requirements or recklessly ignored a high risk that their conduct violated FCRA. A reasonable juror could so conclude based on both direct and circumstantial evidence indicating a high risk that was plainly obvious to petitioners.

The plain text of FCRA informed these insurers that it applied to a "denial" of insurance and "an increase in any charge for . . . any insurance, existing or applied for. 15 U.S.C. § 1681a(k)(1)(B)(i). The FTC told insurers FCRA applied to all "business, credit, and employment actions affecting consumers that can be considered to have a negative impact" (16 C.F.R. Pt. 601, App. C) and specifically informed insurers in March 2000 that it was an adverse action if "the applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report were more favorable." FTC Ball Letter.

Indeed, petitioners had the ability to obtain such specific guidance, just as Mr. Ball did for his insurance client, if they thought their conduct might not violate the statute, but chose not to seek any guidance. 16 C.F.R. § 1.1. Rather than inquire whether their conduct violated the law (which should have been apparent from the statute alone), they recklessly chose to ignore FTC guidance and the safe haven that such guidance might have provided them.

Deposition testimony as well as GEICO's own internal documents demonstrates that it understood as far back as 1998 that it was an "adverse action" to place an applicant in a

less--preferred company or tier based on credit.[38] In fact, GEICO "always" understood this to be the case. GEICO JA 49. And GEICO falsely represented to the Oregon Insurance Division that there was no difference between how it treated so-called "neutral" "no-hit" consumers and the consumers who had the "best credit scores." GEICO JA 58.

Both GEICO and Safeco also misleadingly and without further explanation informed the Oregon Insurance Division that "all applicants" for insurance, including those charged "higher rates" received notice if the underwriting decision was based on credit. GEICO JA 58; Safeco JA 52. This representation to government officials was false and incomplete because Safeco did not send notice to *any* initial applicant who received a higher rate and GEICO only did so in limited circumstances where the rate was higher than the rate GEICO would have charged an "average" consumer and not when it was higher than the rate that the applicant would have qualified for with better credit.

Safeco, despite being aware that the FTC's website and other materials offered compliance guidance, chose to proceed despite specific FTC guidance that FCRA applied to charging an initial applicant a "higher premium" based on credit. Safeco JA 69 (informing Safeco employees that the FTC website provided a "good resource" for information on what insurers needed to know); Safeco JA 65 (FTC pamphlet informing insurers that, charging a consumer a higher rate based in part on credit is an "adverse action" under FCRA).

In addition to the fact issues demonstrating subjective intent, a reasonable juror could conclude based solely on objective factors that a reasonable company in petitioners' position

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[38] As explained above, *see supra* n. 7, the document referenced was belatedly produced, and we have sought leave to lodge it with the Clerk's Office not so that this Court can decide the issue of willfulness, but to illustrate that any factual issues concerning GEICO's subjective intent, under whatever willfulness standard the Court ultimately adopts, are properly litigated in the courts below, on a complete record.

would have understood the objectively high risk that its conduct was unlawful. Specifically, a juror could find that petitioners ignored an objectively high risk that they were violating the law based on (a) the plain terms of FCRA that apply to a "denial" or "increase" in a charge for an initial applicant's insurance when that adverse action is based in part on the applicant's credit information, (b) the specific guidance provided by the FTC, and (c) petitioners' decision to proceed without seeking guidance from the FTC. Ultimately, these fact issues should be resolved first by the trier of fact, not this Court—particularly given that they are not fairly comprised within the questions on which this Court granted certiorari.

CONCLUSION

For the reasons stated above, the Ninth Circuit's judgment should be affirmed and these cases should be remanded for further proceedings.

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Date: December 2006

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FILED
JAN 9 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-84

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CORPORATE DISCLOSURE STATEMENT

Petitioners' Rule 29.6 Statement was set forth at page iii of their opening brief, and there are no amendments to that Statement.

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INTRODUCTION

I. Respondents' proposed interpretation — under which a "willful" violation of FCRA requires mere "reckless disregard" — conflicts with the text of FCRA, undermines the structural integrity of the statute's remedial scheme, and contravenes the intent of Congress in § 1681n. Respondents ask this Court to read into FCRA a convoluted, four-tiered remedial scheme that Congress did not adopt and that borders on incoherence. The far better reading of the statute is that Congress created a straightforward, two-tiered scheme in which plaintiffs can recover full compensation (actual damages, attorney's fees, and costs) for "negligent" violations and can avail themselves of the quasi-criminal remedies of statutory and punitive damages only by proving that the defendant knew that its conduct violated FCRA. This reading is more faithful to the text, structure, and history of FCRA for four principal reasons.

First, as this Court has pointed out on no fewer than seven occasions, there is no "plain" meaning of "willful." The word must be interpreted in its context, and this Court's reading of the term in one statute cannot be transplanted unreflectively to another. In their effort to equate "willful" and "reckless," respondents rely on decisions interpreting statutes that differ in pivotal respects from FCRA. The interpretive principle they espouse, moreover, would render incoherent a wide variety of other statutes that require a showing of "willful *or* reckless" conduct — a disjunctive formulation that is incompatible with respondents' theory that the terms are synonymous.

Second, respondents' characterization of FCRA as a four-tiered scheme — contemplating separate remedies for negligent, reckless, knowing, and "knowing and willful" violations — distorts the statutory structure and would lead to a crazy quilt of difficult-to-distinguish intent standards that Congress could not reasonably have intended. Respondents treat § 1681n(a)(1)(B) as if it were a free-standing provision establishing a separate category

of aggravated liability for "knowing" (as distinguished from "willful" or "knowing and willful") violations. But § 1681n(a)(1)(B) is a *subsection* of § 1681n(a), and the term "knowingly" in § 1681n(a)(1)(B) must therefore be read in conjunction with "willful" in the overarching language of § 1681n(a). In its textual context, "willful" logically must entail "knowing" conduct, not mere recklessness: it is nonsensical to read § 1681n(a) and § 1681n(a)(1)(B) together to prohibit *recklessly* obtaining a consumer report "knowingly without a permissible purpose."

Equally important, Congress's use of "willful" in conjunction with "knowing" in § 1681n(a)(1)(B) indicates that it intended the *mens rea* standard for quasi-criminal statutory and punitive damages under § 1681n to be the same as for criminal liability under § 1681q and § 1681r. Indeed, both respondents and their *amici* concede that Congress's 1996 amendments enacting § 1681n(a)(1)(B) adopted "the same standard used in the criminal provision." Resp. Br. 25. Because the criminal provision requires knowing conduct, the provision at issue here must likewise require knowing conduct.

Third, as pointed out in our opening brief (at 25-26), the statute's drafting history shows that Congress understood "willful" conduct to require something more than "gross negligence." Though respondents and the United States argue that there is a difference between "reckless disregard" and "gross negligence," neither can articulate that difference in any intelligible way. Congress is presumed to understand the seriousness of punitive damages, as a matter of both public policy and constitutional law, and there is no reason to believe that Congress meant such dramatic remedial consequences to hinge on an at best insubstantial distinction between "gross negligence" and "reckless disregard."

Fourth, consistent with the text, structure, and history of FCRA, the federal courts of appeals have consistently held for more than 20 years that "willful" violations

require "knowing" rather than merely "reckless" conduct. Congress has twice amended FCRA — and has once amended § 1681n specifically — since those precedents became clearly established, but it has made no change in the language on which those decisions were predicated. This longstanding circuit precedent, and Congress's failure to overturn it, undermines respondents' attempt to read "willful" to mean "reckless."

II. Reversal in this case would be warranted even if the Court were to leave open the possibility that some unknowing but "reckless" behavior can give rise to liability for statutory and punitive damages under § 1681n. As the United States confirms, and as even respondents acknowledge at various points in their brief, to act "recklessly" means, at a minimum, to "'proceed[] in disregard of a high and excessive degree of danger'" that the conduct is unlawful. Resp. Br. 45, 46 (quoting *Prosser and Keeton on the Law of Torts* § 34, at 214 (5th ed. 1984) ("*1984 Prosser & Keeton*")); *see* U.S. Br. 21. This is an objective threshold standard, and that is especially true when the issue is whether the defendant undertook a risk of *legal error* that was so dangerously "high and excessive" as to constitute an "extreme departure from standards of ordinary care." U.S. Br. 21. This standard requires an objective inquiry into whether Safeco's conduct "ran afoul of clearly established law" or showed indifference "to an objectively high and obvious risk of unlawfulness." *Id.* at 22-23.

Here, as the United States explains, the undisputed objective facts demonstrate that the alleged illegality was not "obvious." Whether FCRA's notice requirement applies to initial applications for insurance was "itself an issue of first impression." *Id.* at 29. The statute's text provides no clear answer to the question, and no court had adopted the reading urged by respondents at the time of the conduct at issue. *See id.* Moreover, the FTC itself, speaking through the brief for the United States, has rejected respondents' claim that an informal and explicitly

non-binding advisory letter by a single FTC staff attorney was sufficient to provide definitive guidance to companies about the FTC's reading of the Act. *See id.* at 29-30 & n.24.

On these facts, Safeco is entitled to summary judgment, and the Ninth Circuit's contrary determination should be reversed. Application of the "willful" requirement to the circumstances presented here is clearly encompassed in the petition for certiorari, which expressly contended that the district court's summary judgment should have been affirmed because of these same facts. *See* Pet. 16; Pet. Reply 8-9. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), this Court not only resolved the meaning of the "willfulness" standard, but also held that the court of appeals had misapplied the standard to the facts presented. The Court has done the same thing in other cases as well, and it should follow that course here. Remand to the Ninth Circuit without application of the proper "willfulness" standard would be inconsistent with prior Court decisions, would fail to provide much needed guidance to courts and litigants (which will gain much by this Court's demonstration of what the general legal standard means in practice), and would create an unnecessary and unwarranted waste of judicial and private resources through needless further proceedings.

ARGUMENT

I. READING "WILLFUL" TO REQUIRE ACTUAL KNOWLEDGE OF ILLEGALITY BETTER ACCORDS WITH THE TEXT, STRUCTURE, AND HISTORY OF FCRA

A. "Willful" Does Not — as a Matter of "Plain Meaning" or Legal Presumption — Include "Reckless"

Adopting the reasoning of the court of appeals, respondents suggest that the "plain" or at least presumptive meaning of the term "willful" includes "reckless." Resp. Br. 17-18; *see also id.* at 25-29, 35. The clear and repeated teaching of this Court's precedents, however, is that the

interpretation of "willful" is an inherently statute- and context-specific inquiry. *See, e.g., Bryan v. United States*, 524 U.S. 184, 191 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 146 (1994); *Cheek v. United States*, 498 U.S. 192, 201 (1991); *Spies v. United States*, 317 U.S. 492, 497 (1943).

In each case in which this Court has interpreted the term "willful" to include some kind of non-knowing conduct, it has done so based on the particularities of the statute at issue. *See* Pet. Br. 30-31; *Thurston*, 469 U.S. at 128 (relying on the legislative history of the Age Discrimination in Employment Act of 1967 ("ADEA")); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 131-33 (1988) (analyzing the structure of the Fair Labor Standards Act of 1938 ("FLSA")); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (relying on accepted judicial interpretation of the FLSA). None of these decisions embraced a generally applicable interpretive rule to the effect that "reckless" conduct is invariably sufficient to satisfy a statutory "willfulness" standard.

This Court's insistence on a nuanced and context-sensitive interpretation is a sound one. Numerous federal statutes use the term "willful" in contradistinction to "reckless" (or its synonym, "grossly negligent") as the threshold requirement for imposing civil or criminal penalties or for administrative enforcement.[1] Significantly, a

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[1] For statutes that use "willful" as distinct from "reckless," see, *e.g.*, 18 U.S.C. § 2724(b)(2) (permitting recovery of punitive damages for improper use of motor vehicle records "upon proof of willful or reckless disregard of the law"); 26 U.S.C. § 6694(b) (providing for $1,000 civil penalty if a tax preparer understates the taxpayer's liability due to either "willful" or "reckless" disregard of rules or regulations); 49 U.S.C. § 5124(a) (providing for criminal penalties against anyone who "willfully or recklessly" violates federal laws or regulations regarding the transportation of hazardous materials).

For statutes that use "willful" as distinct from "grossly negligent," see, *e.g.*, 12 U.S.C. § 1829b(j) (providing for a civil penalty of up to $10,000 for any "insured depository institution" that "willfully or through gross negligence violates" any recordkeeping regulation prescribed by the Secretary of the Treasury); *id.* § 1955(a) (providing

provision of the Truth in Lending Act, a close cousin of FCRA, distinguishes between "gross negligence" and "willful violation[s]" and prescribes different agency action with respect to each category. *See* 15 U.S.C. § 1607(e)(2). These statutes belie the United States' contention (at 10) that there is a "generally established understanding" that "willful" includes "reckless" in civil statutes. To adopt a generally applicable interpretive principle that equates the two terms would render redundant or incoherent the many statutes in which Congress has used "willful" to mean something different from "reckless."

B. Interpreting "Willful" To Require a Knowing Violation Better Conforms with the Text and Structure of FCRA

As explained in our opening brief, the better reading of FCRA is that Congress reserved the drastic remedies of statutory and punitive damages in § 1681n(a) for knowing violations, while permitting actual damages, attorney's fees, and costs for non-knowing (negligent or reckless) violations. None of the objections to this reading offered by respondents or the United States is persuasive, and the contrary reading suffers from serious problems of incoherence and irrationality.

Respondents contend that, "[h]ad Congress intended the word 'willful' in the beginning of section 1681n(a) to require a knowing violation, the additional requirement in the following subsections [§ 1681n(a)(1)(B) and § 1681n(b)] that the defendant 'know' that it did not have a permissible purpose under FCRA would be rendered insignificant if not superfluous." Resp. Br. 19; *see* U.S. Br. 13. But the word "willful" in § 1681n(a), which

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a similar $10,000 penalty against "any person" for "each willful or grossly negligent violation" of any Treasury regulation governing financial recordkeeping); 42 U.S.C. § 14924(c)(1) (providing for withdrawal of accreditation of adoption agencies for "serious, willful, or grossly negligent failures to comply" with regulatory requirements); 43 U.S.C. § 299(k)(2) (creating a cause of action for "double damages plus costs" against a mine operator "for willful misconduct or gross negligence").

applies generally to all substantive bases for liability under FCRA, has a "perfectly straightforward job[] to do" with respect to those causes of action covered by § 1681n(a)(1)(A) — namely, it defines the required state of mind. *Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006).

With respect to § 1681n(a)(1)(B), any minor redundancy is outweighed by the far worse anomaly that would be created by reading "willful" to mean "reckless." Because "reckless" conduct is done without knowledge of illegality, it is simply incoherent to prohibit "*recklessly*" obtaining a consumer report "*knowingly* without a permissible purpose." It makes more sense to tolerate a slight redundancy — one that is readily explainable by the history of Congress's amendments to § 1681n(a)[2] — than to inject an unsolvable contradiction into the heart of a key FCRA provision.

Respondents' suggestion (at 22-23, 27) that § 1681n(a)(1)(B) creates a separate remedial "tier" prohibiting "knowing" (as opposed to "reckless") conduct is also unfaithful to the structure of FCRA because it treats § 1681n(a)(1)(B) as if it were a separate, freestanding section rather than a subsection of § 1681n(a). Respondents concede that, to recover under § 1681n(a)(1)(B), a plaintiff must show "a knowing violation." Resp. Br. 22; *see id.* at 23. They further acknowledge that Congress incorporated into § 1681n(a)(1)(B) the "same standard used in [§ 1681q]," one of FCRA's criminal provisions. *Id.* at 25; *see also* Brief Amici Curiae of the National Consumer Law Center, *et al.*, at 15 ("Congress endorsed that approach when it copied the § 1681q 'knowingly and willfully' language wholesale into § 1681n(a)(1)(B)."). Those concessions are dispositive here: the *mens rea* in § 1681n(a)(1)(B) cannot possibly be different from that of § 1681n(a), because both are governed by the same "willful" language. If a term appearing in several *different* places in a statute should be "read the same way each

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[2] Congress added § 1681n(a)(1)(B) in 1996, when § 1681n(a) already provided for punitive damages for all "willful" violations of the Act.

time it appears," *Ratzlaf*, 510 U.S. at 143, *a fortiori* a single word in a single provision should be read the same way each time it is applied. The only logical way to reconcile the "willful" and "knowing" language in § 1681n(a) and § 1681n(a)(1)(B) is to recognize that Congress intended for statutory and punitive damages to be reserved in all cases for only the most egregious "knowing" violations of FCRA's highly technical requirements.[3]

This conclusion is confirmed by § 1681n(b), which both respondents and the United States concede also requires a showing of actual knowledge. *See* Resp. Br. 22, 23; U.S. Br. 14. Unlike § 1681n(a), however, § 1681n(b) does *not* allow punitive damages even for a knowing violation. Respondents offer no coherent explanation why it would make sense for Congress to authorize the severe remedy of statutory and punitive damages in § 1681n(a) on a showing of intent that is *lower than* that required in § 1681n(b).[4] *See* Pet. Br. 21-22. Nor do respondents explain why Congress would have allowed private plaintiffs to recover potentially uncapped punitive damages for "reckless" conduct while limiting the FTC's administrative remedies under § 1681s(a)(2) to statutory damages for even "knowing" conduct. *See id.* at 22.

Contrary to the convoluted, multi-tiered scheme fashioned by respondents, the better and more straightforward reading of FCRA is that Congress created a two-tiered scheme in which private plaintiffs may recover compensatory damages for all forms of negligent conduct, but may recover statutory and punitive damages only for knowing violations. This does not, contrary to the United

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[3] Reading "willful" to require knowledge does not make the "knowing and willful" language of § 1681q and § 1681r redundant or nonsensical. "Willful and knowing" is a term of art often used, without redundancy, in criminal statutes. *See Bryan*, 524 U.S. at 191.

[4] The title to § 1681n — "Civil liability for willful noncompliance" — further indicates that Congress meant the *entire section* to cover "willful" violations. Section 1681n(b) is a subsection of § 1681n — indicating that Congress saw no distinction or inconsistency between the two *mens rea* standards.

States' contention, leave "reckless disregard" of FCRA a "statutory orphan." U.S. Br. 16-17. That "reckless disregard" does not give rise to a separate "tier" of remedy is the product of Congress's specific decision to reduce the standard for actual damages in § 1681*o* from "gross negligence" to simple negligence. *See infra* Part I.C.

C. The Drafting History of FCRA Evidences Congress's Intent To Require Knowing Noncompliance as a Prerequisite to Statutory and Punitive Damages

Neither respondents nor the United States offer a persuasive rejoinder to the drafting history of FCRA. The Senate bill on which FCRA was based originally established "willful" conduct as the standard for punitive damages and "gross negligence" as the standard for *actual* damages under what eventually became § 1681*o*. As originally written, therefore, "willful" conduct was understood to denote a higher degree of culpability than "gross negligence." The United States contends that "willful" could still mean "reckless" rather than "knowing" because some courts have in the past found a theoretical difference between "gross negligence" and "reckless disregard." U.S. Br. 16 (citing *Prosser and Keeton on the Law of Torts* § 34, at 183 (4th ed. 1971)). But it is absurd to conclude that the bill would have created such a massive discrepancy in consequences based on so thin a distinction. *See Farmer v. Brennan*, 511 U.S. 825, 836 n.4 (1994) (noting that the term "gross negligence" "in practice typically mean[s] little different from recklessness as generally understood in the civil law") (citing *1984 Prosser & Keeton* § 34, at 212).

On the other hand, there is nothing odd about reducing the standard for actual damages from "gross negligence" to simple negligence. *Contra* U.S. Br. 16. As explained in our opening brief, an actual negligence rather than a gross or aggravated negligence standard in § 1681*o* is tailored to enforce FCRA's central aim of making companies formulate "reasonable procedures" for complying with FCRA's substantive provisions. *See* Pet. Br. 32-34; *see*

also U.S. Br. 20 (acknowledging that "FCRA demands, as its starting point, that regulated entities take reasonable measures and strike reasonable balances"). Congress fully understood the competing policy objectives of preserving the privacy and accuracy of consumer information while also facilitating the use of such information in the economy, and it struck a delicate balance between those objectives by promoting "reasonable" procedures. *See* Pet. Br. 32. Congress presumably lowered the standard for actual damages because it recognized that compensatory damages for actual negligence better furthered those twin aims. That recognition does not detract, however, from Congress's simultaneous policy judgment in § 1681n that punitive and statutory damages — which exact a potentially enormous financial toll on defendants and provide a huge windfall to plaintiffs' lawyers, all in the absence of any showing of actual harm — should be reserved for knowing violations.

D. Settled Judicial Interpretation of FCRA Further Supports Reading "Willful" To Require Knowing Noncompliance

The federal courts of appeals interpreting § 1681n(a) have consistently held for the past 20 years that, to establish that a person "willfully fail[ed] to comply" with FCRA, a plaintiff must prove that the defendant "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986); *see* Pet. Br. 27-28 & n.8. This Court has repeatedly looked to such established precedent as a guide for interpreting federal *mens rea* provisions. *See Ratzlaf*, 510 U.S. at 141; *Hazen Paper*, 507 U.S. at 614; *Thurston*, 469 U.S. at 126. In *Thurston* and *Hazen Paper*, settled precedent supported a "reckless disregard" standard. Here, in contrast, consistent judicial interpretation of FCRA supports an actual-knowledge standard.[5]

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[5] Respondents' citation to cases recognizing that punitive damages under state law could be sustained on a showing of reckless disregard is off the mark. *See* Resp. Br. 35 n.21. Respondents point to no evi-

This circuit precedent was established prior to Congress's 1996 amendments to FCRA, which included significant changes to § 1681n.[6] Congress's refusal to disturb this consistent judicial precedent carries special significance because, as this Court has held, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

* * *

In sum, all indicators from the text, structure, and history of FCRA support the conclusion that, to qualify as "willful," a violation must be committed with actual knowledge that one's actions violate the Act. Even if there were residual doubt, the rule of lenity counsels strongly in favor of that conclusion. *See* Pet. Br. 35-36.[7] The Ninth Circuit's judgment should be reversed on this ground. *See id.* at 37.

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dence in the text, structure, or history of FCRA that Congress intended "willful" to incorporate these state-law standards.

[6] Contrary to respondents' assertions, the four circuits that had addressed the issue by 1996 had clearly held that "willful" required proof of a knowing violation. The language in these decisions was not *dicta*: the courts not only enunciated the legal standard but also applied that standard to the facts before them. *See* Pet. Br. 28-29 & n.9. Nor did these cases apply the criminal provision of § 1681q to a *civil* case; rather, they simply recognized that Congress intended to apply similar intent standards to violations of § 1681q and § 1681n. *See Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987) (per curiam); *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 971-72 (4th Cir. 1987).

[7] Contrary to respondents' argument, the rule of lenity should apply with full force here given the recognized "quasi-criminal" nature of punitive damages. *See* Pet. Br. 35-36. Indeed, the policies behind the rule of lenity are particularly strong in the context of § 1681n, which creates the specter of massive statutory and punitive damages for violations of a technical statutory provision that frequently, as in respondents' case, cause no harm.

II. REVERSAL IS REQUIRED EVEN IF SOME "RECKLESS" CONDUCT QUALIFIES AS "WILLFUL" BECAUSE A FINDING OF "RECKLESS DISREGARD" IS FORECLOSED BY THE UNDISPUTED FACTS

Even if this Court were to decide that a "willful" violation of FCRA is broad enough to include some "reckless" conduct that does not involve a "knowing" violation of the law, reversal of the court of appeals' decision vacating summary judgment is nonetheless warranted. The Ninth Circuit's remand to the district court was improper because undisputed objective facts indicate that Safeco's decision not to provide "adverse action" notices to initial applicants for insurance neither violated clearly established law nor ignored an obvious illegality — and therefore could not be reckless.

A. Safeco's Conduct in This Case Is Not "Reckless" as a Matter of Law

As the United States explains in its *amicus* brief, and as respondents effectively concede, reckless disregard for the law requires, at its core, that the defendant have acted "in the face of an unjustifiably high risk" that its conduct will be unlawful. *Farmer*, 511 U.S. at 836. An "unjustifiably high risk" connotes an "aggravated deviation from the standard of ordinary care" that is "so wrongful under the circumstances that it is a proxy for or functionally equivalent to knowing or intentional conduct." U.S. Br. 21.

In this context, where the question of recklessness hinges on whether Safeco ignored an obvious violation of the technical notice provisions of FCRA, the relevant inquiry must focus on the state of existing law at the time of the conduct at issue. As this Court held in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), even under the common-law standard that respondents embrace, punitive damages based on a finding of "reckless" conduct are inappropriate as a matter of law if the underlying theory of liability is "novel or otherwise poorly recognized." *Id.* at 537. Likewise, as the United States

explains, "when the concern is whether the disregard *of the law* was reckless, the extent to which the law was well-established and clearly understood must be part of the analysis." U.S. Br. 22 (emphasis added). Where the law is not "clearly established," it simply cannot be said that a defendant's noncompliance "'takes on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care where a high degree of danger [of illegality] is apparent.'" Resp. Br. 46 (quoting *1984 Prosser & Keeton* § 34, at 214); *see also Screws v. United States*, 325 U.S. 91, 105 (1945) ("willful" conduct means "act[ion] in open defiance or in reckless disregard of a [legal] requirement which has been made specific and definite") (plurality).

The United States' analogy to qualified immunity is apt: Congress's requirement of "willful" conduct must require (at the very least) "violation of clearly established law or indifference to an objectively high and obvious risk of unlawfulness." U.S. Br. 23. Indeed, contrary to respondents' contention (at 47), the argument for a "clearly established" standard is even more powerful under FCRA. Qualified immunity is a judge-made doctrine that often inoculates public officials from individual liability for even compensatory damages for actual (and sometimes egregious) physical harm. By contrast, a "clearly established" standard under § 1681n does not restrict plaintiffs' access to compensatory damages, *see* 15 U.S.C. § 1681*o*, but merely limits the imposition of quasi-criminal statutory and punitive damages for purely technical statutory violations — a result that is more consonant with Congress's express purpose of balancing the legitimate interests of businesses and consumers in the use of credit information. *See* Pet. Br. 32-35. Moreover, a "clearly established" standard is needed to protect the vital role of the attorney-client privilege, which would be severely compromised if defendants routinely needed to mount a subjective good-faith defense even where their conduct was not objectively reckless. *See Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) (refusing to adopt exception to Fifth

Amendment privilege against self-incrimination that "could interfere with the attorney-client privilege").

It is appropriate, moreover, for courts to apply this objective "clearly established" test at the threshold, before inviting an intrusive inquiry into a defendant's subjective state of mind. *Cf. Saucier v. Katz*, 533 U.S. 194, 202 (2001). Absent a "highly unreasonable" risk of illegality, whether the defendant subjectively appreciated that risk is of no moment: "[o]nly if the defendant's failure to comply with the law was objectively reckless [sh]ould it become necessary for a court to probe, as the court of appeals invited here, the defendant's subjective good faith." U.S. Br. 23 (citation omitted). If conduct is not objectively unreasonable, there is no need to burden courts and defendants with discovery, especially where the discovery is as intrusive as that authorized by the Ninth Circuit, which would entail the disclosure of information protected by attorney-client privilege.

Whether a defendant acted in the face of clearly established federal law is an issue of law for the court, rather than a question of fact for a jury. Again, the analogy to qualified immunity provides useful guidance. As courts have routinely held, the question whether the law was "clearly established" for qualified immunity purposes is "a matter of law for the court, hence is always capable of decision at the summary judgment stage." *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992); *see Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("[w]hether an asserted federal right was clearly established at a particular time . . . presents a question of law"). Although respondents repeatedly assert that the question whether conduct is "willful" is generally a jury question, they offer no coherent explanation for how a lay jury could properly assess whether the text of FCRA and case law interpreting it put Safeco on clear notice of its obligations under the law.

Judged against the proper standard, Safeco's conduct in this case cannot be held to have been reckless. Whether

"adverse action" notices had to be sent to initial applicants for insurance who received less than the best possible rate depends on the meaning of the term "increase in any charge" in the definition of "adverse action." 15 U.S.C. § 1681a(k)(1)(B)(i). At the time that Safeco decided against sending such notices, *no court* had ever held that the term "increase in any charge" applied to the initial price charged on a new policy of insurance. *See* U.S. Br. 29 (the question was "itself an issue of first impression").[8] Nor "had the [FTC] provided specific formal guidance on the question." *Id.* The FTC itself specifically disavows the single informal staff letter on which respondents attempt to rely. *See id.* at 29-30 & n.24. Moreover, although respondents never acknowledge it, that informal letter opinion states on its face that it was "not binding on the Commission." Letter from Hannah A. Stires to James M. Ball (Mar. 1, 2000), *available at* http://www.ftc.gov/os/statutes/fcra/ball.htm.[9]

In the absence of any authoritative judicial or administrative interpretation, Safeco's reading of the "increase in

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[8] *Mick v. Level Propane Gases, Inc.*, No. 98-CV-959, 1999 WL 33453772 (S.D. Ohio Sept. 29, 1999), never resolved the meaning of "adverse action"; it merely held that the question was a "common issue of law" for purposes of class certification. *Id.* at *15.

[9] Respondents also cite an educational pamphlet issued by the FTC and contend that Safeco could have sought informal guidance from the FTC under 16 C.F.R. § 1.1. *See* Resp. Br. 7, 49-50. The FTC itself declines to rely on either of these purported bases for a finding of "reckless disregard." *See* U.S. Br. 29. Because the FTC lacks substantive rulemaking authority under FCRA, *see* 15 U.S.C. § 1681s(a)(1), (e), even formal FTC interpretations of FCRA published in the Federal Register are "not substantive rules" but merely "advisory in nature." 16 C.F.R. § 1.73(a)(2). Moreover, seeking an advisory opinion from a federal agency on an ambiguous legal issue is hardly a routine precaution, and it would send ripples through the business community if failure to do so were held to be an "extreme departure from standards of ordinary care" sufficient to give rise to potentially uncapped punitive damages. Respondents' citation to *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001), is off point: while 16 C.F.R. § 1.1 may solve a facial vagueness challenge, the mere *failure* to seek such guidance certainly does not meet the heightened standard of "willful" conduct.

any charge" language of § 1681a(k)(1)(B)(i) cannot be said to disregard an "obvious" violation of the law. U.S. Br. 23. Indeed, as the district court agreed, the plainest and most natural interpretation of that phrase is that it refers to an increase in an actual, existing premium — not a nonexistent, hypothetical charge. *See* Pet. Br. 39-41. Moreover, respondents have no persuasive response to the serious policy problem — previously highlighted by the FTC itself in congressional testimony, *see id.* at 40 — that their proposed interpretation creates: namely, that tens of millions of notices will have to be sent to consumers each year, including consumers whose insurance rate was made *better* because of their good credit score and who thus would not be understood in ordinary terms to have suffered an "adverse action." *See id.* In all events, as the United States recognizes, "the statutory text is not so pellucid on the question" as to put parties on clear notice of their obligation to send notices to initial applicants who received higher than the best theoretically possible rate. U.S. Br. 29. In that context, Safeco's actions cannot be willful as a matter of law, and Safeco should not be subject to potentially billions of dollars in statutory and punitive damages (all without any claim of actual harm to consumers) merely because it guessed wrong as to how one court of appeals would ultimately resolve a novel and uncertain statutory question. *See Kolstad*, 527 U.S. at 537; *Screws*, 325 U.S. at 105 (plurality).

B. The Application of the "Willful" Requirement to These Facts Is Properly Before This Court

Respondents suggest that Safeco could at most obtain *vacatur* and remand, rather than reversal, because Safeco did not include a separate question presented addressing the proper application of the "willful" standard to the facts of this case. Resp. Br. 57. But the application of the correct "willfulness" standard to these judgments is well within the scope of the question presented by Safeco's petition and is properly before this Court.

Whether Safeco's conduct could be "willful" given the uncertainty in the law was an issue presented to and squarely decided by the Ninth Circuit.[10] Safeco's brief to the Ninth Circuit argued that, "[b]ecause the questions raised by Plaintiffs' claims involve issues of first impression, they cannot support a willful violation of FCRA." Safeco C.A. Br. 54. The Ninth Circuit rejected this contention and directed the district court on remand to undertake an intrusive inquiry into "how the company's decision was reached, including the testimony of the company's executives and counsel." Pet. App. 129a.

Safeco's petition for certiorari expressly objected to the Ninth Circuit's decision to remand, arguing that its conduct, as a matter of law, could not be "willful": "Had this case been heard in any of these other three circuits, the district court's decision granting summary judgment to defendants would have been affirmed. As a matter of law, defendants could not have known that they were violating FCRA's notice provisions given the absence of a single judicial opinion in the 35 years since FCRA's passage holding that these provisions are triggered in the context of initial policies for insurance and, further, given the fact that defendants' legal position on that question was later adopted in multiple district court decisions." Pet. 16; *see also* Pet. Reply 8 (asking the Court to grant certiorari in order "to apply the proper 'willfulness' standard to this case").

It is no objection that Safeco did not include a discrete question presented in its petition specifically "seek[ing] certiorari on the question of application of the legal standard to the facts." Resp. Br. 57. Issues are properly before the Court if they are "fairly included" within the question presented in the petition for certiorari. Sup. Ct. R. 14.1(a). Application of the law to the facts is "fairly included" in questions challenging the propriety of the court

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[10] Respondents are therefore mistaken when they assert that Safeco "ask[s] this Court to be the first court to rule" on the issue. Resp. Br. 57.

of appeals' legal standard. This Court, after all, "sit[s] to decide concrete cases and not abstract propositions of law." *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981); *see also California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (internal quotation marks omitted).

For these reasons, in analogous cases, this Court has not required a separate question presented before applying a newly announced legal standard to the case before it. Indeed, in *Thurston*, which respondents elsewhere cite as the most pertinent precedent, the Court granted certiorari on the question "[w]hether specific intent to discriminate is necessary to establish a 'willful' violation under the [ADEA]." Brief of Trans World Airlines at i, Nos. 83-997 & 83-1325, 1984 WL 566145 (U.S. filed May 17, 1984). As here, the district court had granted summary judgment for TWA, but the court of appeals reversed, finding that TWA's conduct could be "willful" if it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983). This Court held that the court of appeals' articulation of the "willful" requirement in the ADEA was "acceptable," but then proceeded to hold that the court of appeals "misapplied" that standard because there was "no evidence that TWA acted in 'reckless disregard' of the requirements of the ADEA." 469 U.S. at 128-29, 130.

Likewise, in *James v. United States*, 366 U.S. 213 (1961), the Court granted certiorari to decide "[w]hether the receipt of embezzled funds . . . constitutes the receipt of taxable income in the hands of the embezzler." Brief for Petitioner at 3, No. 63, 1960 WL 98685 (U.S. filed Aug. 24, 1960). The case arose on appeal of the petitioner's conviction for a "willful" evasion of federal tax obligations. Although the Court held that embezzled funds were taxable income, abrogating its prior decision in *Commis-*

sioner v. Wilcox, 327 U.S. 404 (1946), it went on to hold that the petitioner could not, as a matter of law, be convicted for a "willful" violation of the tax laws, given that the Court had just overturned its prior decision on whether embezzled funds were income. *James*, 366 U.S. at 221-22.

Other cases are to the same effect: this Court regularly applies newly announced legal standards to the facts before it without requiring a separate question presented asking the Court to do just that, including twice just last Term. *See Burlington N. & S.F. Ry. Co. v. White*, 126 S. Ct. 2405, 2416 (2006) (resolving circuit split on retaliatory discrimination claim under Title VII and upholding jury verdict based on newly announced standard); *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006) (applying standard for RICO liability and holding that no liability could exist as a matter of law).[11]

The Court should follow the same practice here. Because Safeco's conduct cannot be deemed "willful," and because this is an objective issue that turns purely on the text of FCRA and existing law, there is no need for further factual development on remand. *Vacatur* and remand to the Ninth Circuit would therefore be a waste of judicial resources. It would also deprive the lower courts of urgently needed guidance on the meaning and application of FCRA's willfulness requirement in concrete contexts.[12]

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[11] *See also, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) (granting certiorari to decide whether plaintiff claiming fraud on the market must prove loss causation, and applying affirmative conclusion to dismiss complaint); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) (applying newly established defenses under Title VII and finding them unavailable to defendants on the record facts).

[12] A number of cases are being held in the lower courts pending this Court's decision. *See, e.g., Murray v. New Cingular Wireless Servs., Inc.*, Nos. 06-2477 & 06-2722 (7th Cir. Oct. 17, 2006) (staying appeal pending decision in *GEICO* and *Safeco*); *Halton v. American Int'l Group Inc.*, Case No. 06-C-443 (E.D. Wis. Jan. 3, 2007); *Forrest v. JPMorgan Chase Bank, N.A.*, Case No. 06-C-298 (E.D. Wis. Dec. 19, 2006); *Johnson v. Juniper Bank*, Case No. 06-C-13 (E.D. Wis. Dec. 18,

All the factors cited by the United States to support reversal in *GEICO* warrant the same result in *Safeco*. *See* U.S. Br. 29-30. Without elaboration, however, the brief for the United States advocates *vacatur* and remand in this case, while urging reversal in *GEICO*. *See id.* at 30. There is no basis for differentiating between the two cases. As the United States' brief acknowledges, the first question presented in both *GEICO* and *Safeco* fairly includes the question "whether the court of appeals erred in articulating and applying the reckless-disregard standard." U.S. Br. I; *see also* Sup. Ct. R. 14.1(a). And the body of Safeco's petition (just like Geico's) unambiguously raised the application of the "willful" standard. Given that the application of a proper "willfulness" standard to the Ninth Circuit's judgments is an inherent part of the first question presented in both *Safeco* and *GEICO*, there is no basis for treating the former any differently from the latter.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for reinstatement of the judgment of the district court dismissing plaintiffs Burr's and Massey's claims.

2006); *Norwood v. Name Seekers Inc.*, Case No. 06-cv-436 (E.D. Wis. Dec. 15, 2006); *Bernal v. KeyBank, N.A.*, Case No. 06-C-008 (E.D. Wis. Dec. 14, 2006); *Johnson v. IndyMac Bank, F.S.B.*, Case No. 05-cv-856 (E.D. Wis. Nov. 27, 2006); *Ashby v. Farmers Group, Inc.*, No. 01-CV-1446, 2006 WL 3169381, at *1 (D. Or. Oct. 30, 2006); *Murray v. Cingular Wireless II, LLC*, No. 1:05-cv-01334 (N.D. Ill. Aug. 18, 2006) (staying appeal pending Seventh Circuit's decision in *Murray*, *supra*).

Respectfully submitted,

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January 9, 2007

062

FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-84 and 06-100

In the Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL., PETITIONERS

v.

CHARLES BURR, ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL., PETITIONERS

v.

AJENE EDO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR IN NO. 06-84 AND REVERSAL IN NO. 06-100

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QUESTIONS PRESENTED

The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, imposes civil liability on "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer," 15 U.S.C. 1681n(a). The Act further requires a person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" to provide the consumer with notice of the action. 15 U.S.C. 1681m(a). The questions presented are:

1. Whether the phrase "willfully fails to comply" with the FCRA's requirements encompasses not only knowing violations of the Act, but also reckless disregard of the law's obligations and, if so, whether the court of appeals erred in articulating and applying the reckless-disregard standard.

2. Whether charging an insurance customer a higher rate based, in whole or in part, on his credit report constitutes an "adverse action," notwithstanding the fact that the insured would have received the same rate even if no consumer report had been consulted.

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INTEREST OF THE UNITED STATES

This case concerns the proper construction of the adverse-action and civil-liability provisions of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* Congress charged the Federal Trade Commission (Commission) with primary responsibility for civil enforcement of the FCRA, while vesting federal banking and other agencies with complementary authority over the Act's application in certain specialized contexts. See 15 U.S.C. 1681m(h)(8)(B) (Supp. IV 2004); 15 U.S.C. 1681s(a)-(b) (2000 & Supp. IV 2004). The Commission has also issued formal guidance on the FCRA's construction and implementation, see 16 C.F.R. Pt. 600 App. The United States accordingly has a vital interest in ensuring the proper interpretation and application of the FCRA's provisions, and participated as amicus curiae in this Court's prior FCRA case. See *TRW Inc.* v. *Andrews*, 534 U.S. 19 (2001).

STATEMENT

1. a. Congress enacted the FCRA in 1970 to prevent harm to consumers arising from flaws in the credit reporting system, to protect consumer privacy, and to improve the integrity and reliability of credit reports, thereby promoting efficiency in the Nation's banking and consumer credit systems. *TRW*, 534 U.S. at 23; S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969). Congress found that "[a]n elaborate mechanism has been developed" for investigating, cataloguing, and disseminating information about the "credit standing, credit capacity, character, and general reputation" of tens of millions of consumers. 15 U.S.C. 1681(a)(2). Congress passed the FCRA "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartial-

ity, and a respect for the consumer's right to privacy." 15 U.S.C. 1681(a)(4). Improving the "[a]ccuracy and fairness of credit reporting," 15 U.S.C. 1681(a), was critical because "[i]naccurate credit reports directly impair the efficiency of the banking system" and erode "the public confidence which is essential to the continued functioning of the banking system," 15 U.S.C. 1681(a)(1). Congress thus directed consumer reporting agencies "[to] adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information" in a manner that is "fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. 1681(b).

The FCRA identifies the purposes for which consumer reports may permissibly be requested and used, including the underwriting of insurance. 15 U.S.C. 1681b(a)(3)(A)-(C) (Supp. IV 2004). The Act also gives consumers the right to see their credit report, 15 U.S.C. 1681g (2000 & Supp. IV 2004), and establishes detailed procedures for the resolution of consumers' disputes over the accuracy of reports, 15 U.S.C. 1681i (2000 & Supp. IV 2004). The Act further requires all users of credit reports to provide notice to the affected consumer whenever they "take[] any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," and to inform the consumer of the right to obtain a copy of the report and to challenge its content. 15 U.S.C. 1681m(a).

b. Congress created a federal cause of action for consumers against those who furnish credit information, or who create, market, or use credit reports in violation of

the FCRA. 15 U.S.C. 1681p (Supp. IV 2004).[1] Under 15 U.S.C. 1681*o* (2000 & Supp. IV 2004), "[a]ny person who is negligent in failing to comply with any requirement imposed under [the FCRA] with respect to any consumer" is liable for "actual damages sustained by the consumer as a result of the failure," as well as costs and attorney's fees. 15 U.S.C. 1681*o*(a) (2000 & Supp. IV 2004). If the failure to comply with a requirement of FCRA is "willful[]," the consumer may obtain (i) either actual damages or statutory damages "of not less than $100 and not more than $1,000," (ii) "such amount of punitive damages as the court may allow," and (iii) costs and attorney's fees. 15 U.S.C. 1681n(a)(1)(A)-(3).[2]

2. This case arises out of two separate proposed class actions against two different insurance companies for allegedly failing to comply with the FCRA's adverse-action notice requirements.

a. Respondent Edo applied to GEICO for automobile insurance.[3] GEICO relied on Edo's credit report to eval-

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[1] In 2003, Congress limited private enforcement of violations of Section 1681m. See 15 U.S.C. 1681m(h)(8) (Supp. IV 2004).

[2] Congress also established civil liability for specific instances of "knowing noncompliance," rendering any person "who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose" liable to the consumer reporting agency for either actual damages or $1000 in statutory damages, "whichever is greater." 15 U.S.C. 1681n(b). Congress further directed that a "natural person" who obtains a consumer report from any source "under false pretenses or knowingly without a permissible purpose" is likewise liable for the greater of either actual damages or $1000. 15 U.S.C. 1681n(a)(1)(B).

[3] While the parties disputed below which (if any) of the GEICO and Safeco companies were proper defendants, petitioners do not press that argument here. Accordingly, this brief refers to the petitioners in No. 06-100 as "GEICO" and in No. 06-84 as "Safeco."

uate his application and, based in part on the report, offered Edo insurance at a higher premium rate than it offered to other applicants. 06-100 Pet. App. 39a.

Originally, GEICO provided adverse action notices to all customers whose initial insurance rates were based, at least in part, on adverse credit reports. 06-100 Pet. App. 12a. GEICO subsequently changed that policy and, instead, compared the rate an insured was offered to the rate he would have been offered if the credit report had been "neutral." *Ibid.* Where GEICO determined, as it did in Edo's case, that the rate would not have changed if it had applied a neutral credit score (or if it had not considered his credit score at all), GEICO did not issue an adverse action notice. *Id.* at 14a, 21a n.12. In 2002, GEICO abandoned that policy and resumed issuing adverse action notices "whenever a report with more favorable credit information would have resulted in a lower insurance rate." *Ibid.*

Edo filed a proposed class-action lawsuit against GEICO alleging that GEICO violated the FCRA by failing to provide him with an adverse action notice. The complaint sought statutory and punitive damages. 06-100 Pet. App. 9a. The district court granted GEICO's motion for summary judgment, *id.* at 37a-47a, holding that no adverse action occurred because Edo's insurance rate "would have been the same even if GEICO Indemnity did not consider information in [Edo's] consumer credit history." *Id.* at 46a.

b. Respondents Charles Burr and Shannon Massey purchased insurance policies from Safeco. Safeco relied on information in their consumer reports to set the initial premiums and, based on that information, charged them higher rates than it charged customers with better re-

ports. Safeco, however, did not issue Burr or Massey adverse action notices. 06-84 Pet. App. 4a-5a, 11a.

Burr and Massey subsequently joined as named plaintiffs in a proposed class-action lawsuit alleging that Safeco's failure to provide adverse action notices after setting higher insurance premiums based on their credit reports constituted a willful violation of the FCRA. 06-84 Pet. App. 24a. While they did not allege actual damages, Burr and Massey sought statutory and punitive damages. 06-84 Pet C.A. Supp. E.R. 3-4.

The district court granted Safeco's motion for summary judgment against Burr and Massey. 06-84 Pet. App. 3a-14a. The court held that the use of a credit report to set higher premiums for an initial application for insurance was not an "adverse action" because the FCRA requires an "increase in any charge for" insurance, 15 U.S.C. 1681a(k)(1)(B)(i), and such an increase could occur only if the "insurer charges an insured one price for insurance and then subsequently increases that charge." 06-84 Pet. App. 11a-12a.

3. The court of appeals reversed in both cases. 06-84 Pet. App. 1a-2a; 06-100 Pet. App. 1a-36a.

a. In respondent Edo's case, the court held that GEICO's use of his credit report to set his insurance rate constituted an "adverse action" under the FCRA, because the company relied on the report and, if Edo's credit rating had been better, he would have been charged a lower rate. 06-100 Pet. App. 20a-21a.

Addressing the standard for a willful violation of the FCRA, the Ninth Circuit agreed with the Third Circuit that a defendant acts "willfully" if it acts with either a conscious disregard of consumers' known rights under the FCRA or "reckless disregard of whether the policy [or action] contravened those rights." 06-100 Pet. App.

31a (quoting *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997)). The court further held that, under the reckless-disregard standard, a defendant will be liable if it relies "on creative lawyering that provides indefensible answers," "implausible interpretations," or "creative but unlikely answers to 'issues of first impression.'" *Id.* at 33a-34a. The court concluded that "at least some of the interpretations" in the case were "implausible," *id.* at 34a, and remanded to the district court for further proceedings. *Id.* at 36a.

b. In petitioner Safeco's case, the court of appeals reversed. 06-84 Pet. App. 1a-2a. Based on its decision in *Edo*, the court held that the FCRA's adverse action provision applies to increases in the charge for an initial policy of insurance, *id.* at 1a-2a, and that Safeco could be held to have acted willfully, *id.* at 2a.

SUMMARY OF ARGUMENT

I. Under the FCRA, a person willfully fails to comply with the law if he or she acts knowingly or in reckless disregard of the Act's requirements. For decades, this Court has repeatedly held that the term "willfully" in civil statutes encompasses not only knowing, but also reckless, disregard of the law or the rights of others. That familiar pattern includes statutes that were enacted contemporaneously with the FCRA and that share its focus on compliance with laws protecting federally created rights. In the absence of a contrary indication in the text—and there is none in the FCRA—this Court's settled practice is to assume that Congress hewed to that pattern, rather than departed anomalously from it. That ordinary reading of "willfully" also comports with the FCRA's structure, which separately carves out for more serious treatment certain violations committed "know-

ingly," a limitation that would be meaningless if "willfully" were already confined to violations of known legal standards.

While the court of appeals was correct to construe "willfully" as incorporating a reckless-disregard component, the court misdescribed and misapplied that standard. To establish reckless disregard in failing to comply with the law, a plaintiff must show more than an unreasonable, unlikely, or implausible construction of the law. The plaintiff must establish that the defendant acted either in disregard of known legal obligations or with indifference to an objectively high and obvious risk of unlawfulness. Reckless disregard, in other words, requires such an extreme departure from standards of ordinary care as either to be tantamount to acting knowingly or to reflect such disregard for the law as to merit equivalent censure.

II. The court of appeals correctly held that charging a customer a higher rate for insurance based on his credit report constitutes an adverse action. The FCRA defines "adverse action" to include "an increase in any charge for [insurance] * * * applied for" based on the content of a credit report. 15 U.S.C. 1681a(k)(1)(B)(i). That language readily encompasses charging an individual a higher rate than that given to customers with better credit reports, just as charging a higher premium based on a new applicant's other individual characteristics, such as age, gender, or a poor driving record, would naturally be described as an "increase" in the rate charged.

GEICO argues that no adverse action occurred because Edo would have received the same insurance rate if his credit report had not been used. But that is irrelevant. Edo's credit report was used, and GEICO charged

Edo a higher rate as a result. The rate he would have been charged if, contrary to fact, his report has not been consulted is beside the point. Insurers are not required to use credit reports, but when they choose to do so they must comply with Congress's calibrated scheme, which seeks to protect both consumers and the integrity and reliability of the Nation's credit and banking systems, and which makes providing consumers with notice of all adverse actions critical to accomplishing those goals.

While GEICO's construction of the adverse-action notice requirement was erroneous, the resulting failures to notify consumers were not willful violations of the FCRA. The legal question of the FCRA's coverage was one of first impression that was not settled by statutory text, formal agency guidance, or case law. GEICO's reading, while wrong, does not reflect the type of extreme departure from responsible judgment that amounts to reckless disregard of the law.

ARGUMENT

I. A "WILLFUL" FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE FCRA REQUIRES PROOF THAT THE DEFENDANT EITHER KNOWINGLY OR RECKLESSLY DISREGARDED THE LAW

"[W]illfully" is "a word of many meanings," the construction of which "is often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998) (quoting *Spies* v. *United States*, 317 U.S. 492, 497 (1943)).[4] When the word appears in criminal statutes, it generally refers to a "culpable state of mind,"

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[4] See *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *United States* v. *Bishop*, 412 U.S. 346, 352 (1973); *Screws* v. *United States*, 325 U.S. 91, 101 (1945).

such as a "bad purpose" to violate the law, *Bryan*, 524 U.S. at 191 & n.12. By contrast, when (as here) "willfully" appears in a civil statute—particularly one that is designed to protect federal rights and that is framed in terms of the defendant's compliance with the law—the term means a knowing or reckless disregard of the law. "Recklessness," in turn, requires more than mere negligence. *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988). It imposes an objective standard that is satisfied only if the defendant acted in the face of such a high risk that its conduct would violate the law that the illegality was either known or so obvious as to require the exercise of greater care.

A. "Willfully" Is Traditionally Interpreted In Civil Statutes, Particularly Laws Designed To Enforce Federal Rights, To Mean Either Knowing Or Reckless Disregard Of Legal Obligations

Construing the word "willfully" in the FCRA to encompass both knowing and reckless disregard of the law "is surely a fair reading of the plain language of the Act." *Richland Shoe*, 486 U.S. at 133. More than a half-century ago, in *United States* v. *Illinois Central R.R.*, 303 U.S. 239 (1938), the Court approved the following "useful guide to the meaning of the word 'willfully'" in the civil context: "it means purposely or obstinately and is designed to describe the attitude of a [defendant], who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to [the statute's] requirements," *id.* at 243.

More recently, in *TWA, Inc.* v. *Thurston*, 469 U.S. 111 (1985), this Court held that liquidated damages for "willful violations" of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 601 *et seq.*, required proof

that the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Thurston*, 469 U.S. at 125-126; see *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 617 (1993) (same). The Court reached the same conclusion under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* See *Richland Shoe*, 486 U.S. at 133.[5]

That generally established understanding of "willfully" in the civil context forms the backdrop against which Congress enacted the FCRA's willful liability provision, and thus the "absence of [any] contrary direction" in the statute evidences Congress's "satisfaction with [that] widely accepted definition[], not * * * a departure from [it]." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). That common-sense assumption has particular salience here, for two reasons.

First, when Congress's aim is to enforce federal rights and to induce regulated entities' attention and adherence to the obligations of federal law, Congress has a long tradition of employing the reckless-disregard standard to accomplish that end. In the FCRA, just like the FLSA and the ADEA, the object to which the willfulness standard refers is a defendant's failure to comply with the particular legal constraints imposed by the Act itself. Compare 15 U.S.C. 1681n(a), with 29 U.S.C. 255(a); 29

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[5] GEICO notes (06-100 Pet. 15) that *Richland Shoe* involved only a statute-of-limitations provision. There is no reason why that distinction should matter, however. Indeed, it was the established construction of the FLSA's criminal willfulness provision that provided the predicate for the Court's adoption of that recklessness standard. See *Richland Shoe*, 486 U.S. at 133; *Thurston*, 469 U.S. at 125-127. Moreover, the FLSA's civil penalty provision, 29 U.S.C. 216(e), accords "willfully" the same established meaning. See *Baystate Alternative Staffing, Inc.* v. *Herman*, 163 F.3d 668, 679-680 & n.14 (1st Cir. 1998).

U.S.C. 626(b).[6] It was in that context that this Court concluded in *Thurston* and *Richland Shoe* that willfulness encompasses a defendant's reckless disregard of the law. That same recklessness standard governs liability provisions in other federal laws, like (i) the Family and Medical Leave Act, 29 U.S.C. 2617(c)(2) (statute of limitations)[7]; (ii) the Occupational Safety and Health Act, 29 U.S.C. 666(a) (civil penalties)[8]; (iii) the Copyright Act, 17 U.S.C. 504(c)(2)[9]; and (iv) firearms licensing, 18 U.S.C. 923(e) (Supp. IV 2004).[10]

Congress similarly employed a standard of reckless disregard or reckless indifference to federal rights to enforce, through punitive damages, compliance with Title VII, 42 U.S.C. 2000e *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* See 42 U.S.C. 1981a(b)(1); *Kolstad* v. *American Dental Ass'n*, 527 U.S.

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[6] That stands in distinction to willfulness standards that focus on conduct external to the statute. See, *e.g.*, Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, art. 25(1), 49 Stat. 3020, 137 L.N.T.S. 27 ("willful misconduct"); 11 U.S.C. 523(a)(6) ("willful and malicious injury"); 38 U.S.C. 1110 ("willful misconduct").

[7] See *Porter* v. *New York Univ. Sch. of Law*, 392 F.3d 530, 531-532 (2d Cir. 2004); *Hanger* v. *Lake County*, 390 F.3d 579, 583-584 (8th Cir. 2004); *Hillstrom* v. *Best Western Hotel*, 354 F.3d 27, 33 (1st Cir. 2003).

[8] See, *e.g.*, *A.J. McNulty & Co.* v. *Secretary of Labor*, 283 F.3d 328, 337 (D.C. Cir. 2002); *Brock* v. *Morello Bros. Constr., Inc.*, 809 F.2d 161, 164 (1st Cir. 1987) (Breyer, J.).

[9] See, *e.g.*, *Island Software & Computer Serv., Inc.* v. *Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005) (willfulness requires actual knowledge or "reckless disregard," or "willful blindness"); *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003), cert. denied, 540 U.S. 1107 (2004).

[10] See *RSM, Inc.* v. *Herbert*, No. 06-1393, 2006 WL 3026344, at *5 (4th Cir. Oct. 26, 2006) ("deliberate disregard" or "plain indifference").

526, 535-538 (1999). That same standard has been employed to enforce constitutional and civil rights generally under 42 U.S.C. 1983. See *Smith* v. *Wade*, 461 U.S. 30, 51 (1983) ("adopt[ing]" for Section 1983 "the policy judgment of the common law—that reckless or callous disregard for the plaintiff's rights * * * should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages").

Second, the FCRA was enacted in 1970, contemporaneously with other statutes in which "willfully" has been held to encompass reckless disregard. The ADEA was enacted in 1967, see Pub. L. No. 90-202, 81 Stat. 602, while the FLSA provision at issue in *Richland Shoe* was enacted in 1966, Pub. L. No. 89-601, § 601(b), 80 Stat. 844. There is no sound basis for holding that the meaning of "willfully" in civil statutes deviated dramatically before 1970. See *Dixon* v. *United States*, 126 S. Ct. 2437, 2445 (2006) (courts must construe a statutory term in a liability provision "as Congress may have contemplated it" at the time of enactment).

Accordingly, giving "willfully" in the FCRA's civil liability provision the same established meaning that the term signifies in substantively analogous and contemporaneously enacted statutes would be consistent with Congress's general practice of employing a "reckless disregard" standard to enforce compliance with federal law and to induce solicitude for federally created rights.[11]

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[11] Safeco argues (Pet. 20) that *Thurston* and *Richland Shoe* are distinguishable because the "willful" provisions in the ADEA and the FLSA were enacted "against the backdrop of consistent circuit precedent interpreting the term 'willful' to include 'reckless disregard.'" But that circuit precedent merely reflected this Court's repeated decisions construing "willful" to include a reckless-disregard component. See *Thurston*, 469 U.S. at 126 ("The definition of 'willful'

B. The Structure Of The Fair Credit Reporting Act Demonstrates That "Willfully" Includes Both Knowing And Reckless Disregard Of The Law

Petitioners' argument (06-84 Pet. 28; 06-100 Pet. 21-24) that willfulness requires actual knowledge of the violation of federal law not only overlooks established usage of the term in civil statutes, but also fails to comport with the overall structure and design of the FCRA.

First, when Congress wanted to restrict liability to knowing violations of the FCRA, it said so explicitly. Section 1681n(a)(1)(B) explicitly identifies and targets for separate treatment a specialized subset of violators within the general category of willful violations of the FCRA: those defendants who violate 15 U.S.C. 1681b(f) by obtaining a credit report either "under false pretenses" or "knowingly without a permissible purpose." 15 U.S.C. 1681n(a)(1)(B). If the word "willfully" in the overarching civil-liability subsection (15 U.S.C. 1681n(a)) already restricted the scope of that provision to "knowing" violations of the law, there would have been no reason for Congress to repeat that "knowingly" limitation in subparagraph (1)(B). This Court does not generally construe statutory terms in a manner that leaves them "with no job to do." *Doe* v. *Chao*, 540 U.S. 614, 623 (2004). Congress also increased the minimum statutory damages for such violators to no less than $1000, 15 U.S.C.

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adopted by the above cited courts [of appeals] is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes."); see also *id.* at 126-127. Indeed, that meaning was so well settled that the *Richland Shoe* Court *rejected* a contrary standard that had, in fact, been "widely used for a number of years" by courts of appeals, 486 U.S. at 133, because that reading was contrary to the "plain language of the statute," which dictated a knowing or reckless-disregard standard, *id.* at 134.

1681n(a)(1)(B), which underscores that Congress considered the conduct more culpable than the "willful" violations covered by the rest of the provision—such as obtaining a report with reckless disregard of the impermissibility of the purpose, which would render the person liable under Section 1681n(a)(1)(A) for a willful violation of Section 1681b(f).

Likewise, in Section 1681n(b), Congress created a cause of action for consumer reporting agencies (as opposed to consumers) that is limited to actions taken under false pretenses or "knowingly without a permissible purpose." 15 U.S.C. 1681n(b). Congress subtitled that provision "Civil liability for knowing noncompliance," in contrast to Section 1681n's general caption of "Civil liability for willful noncompliance." If willfulness were already limited to knowing violations, there would have been no reason for Congress to separate out structurally those violations that require a knowing violation of the FCRA. See also 15 U.S.C. 1681s(a)(2)(A) (civil liability actions by the Commission require a "knowing violation" of the FCRA). The plain import of Congress's language and structure thus confirms what the ordinary understanding of the text says—liability for "willful" violations reaches further than just knowing violations of the law and includes conduct in reckless disregard of the FCRA's requirements.

Second, Congress's deliberate use of different *mens rea* phraseology in the FCRA's criminal prohibitions underscores Congress's sensitivity to the distinct usages of "willfully" in civil and criminal law. In 15 U.S.C. 1681q and 1681r respectively, Congress criminalized the obtaining of credit reports under false pretenses and the unauthorized disclosure of consumer information when done "knowingly and willfully." Together, those terms

are understood to mean a conscious and intentional violation of a statute, *Black's Law Dictionary* 1012 (rev. 4th ed. 1968), and suggest a "bad purpose" component to "willfully" that is consonant with its traditional usage in criminal statutes, see *Bryan*, 524 U.S. at 191 & n.12; see also *United States* v. *Murdock*, 290 U.S. 389, 395 (1933), overruled in other part, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964).[12]

Petitioners, however, propound a reading of "willfully" that leaves little, if any, room between Congress's differently articulated criminal and civil provisions. See 06-84 Pet. 18 (requiring an "intentional refusal to abide by known legal requirements"); *id.* at 28; 06-100 Pet. 21. This Court should "refrain from concluding here that the differing language in the two subsections has the same meaning in each," especially when it would have the effect of equating the higher *mens rea* of the criminal prohibitions with the requirements of the distinctly worded civil provisions. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Third, petitioners' reading of "willfully" leaves no natural home in the structure of the liability provisions for reckless disregard of the FCRA's requirements. The FCRA authorizes civil damages actions for "willful noncompliance," 15 U.S.C. 1681n, and "negligent noncompliance," 15 U.S.C. 1681o (2000 & Supp. IV 2004). As between the two, the more natural and traditional home for liability based on reckless disregard is the willfulness

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[12] Tellingly, even in the criminal context, "willfully" has been understood to include reckless disregard of the law or the rights of others. See, *e.g.*, *Thurston*, 469 U.S. at 125-126 (equating its "reckless disregard" standard with the standard for establishing criminal liability under the FLSA).

provision. See *Hazen Paper*, *supra*; *Richland Shoe*, *supra*; *Thurston*, *supra*.

Furthermore, as petitioners note (06-84 Pet. 20-21; 06-100 Pet. 22), Congress considered and rejected a provision that would have made "gross negligence," rather than negligence, the standard for obtaining actual damages. As passed by the Senate, the predecessor bill to the FCRA dichotomized civil liability into "willful noncompliance" and "grossly negligent non-compliance." S. 823, 91st Cong., 1st Sess. § 617 (1969); see S. Rep. No. 517, *supra*, at 7. In the Conference Committee, the latter standard was lowered to mere negligence. H.R. Conf. Rep. No. 1587, 91st Cong., 2d Sess. 30 (1970).

Equating "gross negligence" with reckless disregard (06-84 Pet. 20; 06-100 Pet. 22), petitioners contend that Congress must have intended that the willfulness provision not extend to grossly negligent conduct. But "most courts consider that 'gross negligence' falls short of a reckless disregard of consequences," W. Prosser, *The Law of Torts* § 34, at 183 (4th ed. 1971), so the failure to incorporate a gross negligence standard into Section 1681*o* sheds little light on Congress's views regarding recklessness. Moreover, it is highly doubtful that the same Members of Congress who rejected "gross negligence" as too high a threshold for actual damages simultaneously concluded that the threshold for the further remedies of statutory and punitive damages should be as high as knowing conduct, and not reckless disregard. Petitioners' reading of the FCRA's text and legislative history is not only counterintuitive, but also would leave "reckless disregard" of the FCRA's terms a statutory orphan—a standard of culpability that sets too high a bar to fit logically within the Act's negligent non-compliance

provision and too low a bar to fall within the willful noncompliance provision.[13]

Fourth, petitioners argue (06-84 Pet. 23-24; 06-100 Pet. 15, 17) that "recklessness disregard" sets too low a threshold for punitive damages. But reckless disregard or indifference to federal rights is an established standard for punitive damages liability and a familiar one to businesses, including those involved in consumer reporting, see *Dun & Bradstreet, Inc.*, v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 751, 760-763 (1985) (plurality opinion) (credit reporting agencies favor a reckless-disregard standard). Indeed, a number of State consumer-reporting laws appear to impose the same or a similar standard for punitive damages, so it is a standard with which petitioners are already familiar when using consumer reports.[14]

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[13] Petitioners argue that Congress actually "consider[ed]" versions of the liability provision that would have allowed actual and punitive damages for "willful or grossly negligent" violations. See 06-100 Pet. 22 (emphasis omitted); see also 06-84 Pet. 21. That is a generous reading of the legislative history. The two House bills to which they refer never received a single day of debate or hearings, and never made it out of Committee, let alone the House. See H.R. 19403, § 52, 91st Cong., 2d Sess. (Sept. 22, 1970); H.R. 19410, § 52, 91st Cong., 2d Sess. (Sept. 22, 1970). Furthermore, even if a handful of Representatives were aware of that language, their failure to press for its enactment may well have reflected their concurrence with this Court's view that the "gross negligence" standard is "too vague, and too likely to be confused with mere ordinary negligence, to provide a fair standard" for punitive damages. *Smith*, 461 U.S. at 43; see *id.* at 49; *Farmer* v. *Brennan*, 511 U.S. 825, 836 n.4 (1994).

[14] See Cal. Civ. Code § 1785.20 (West 1998); *id.* §§ 1785.31, 1786.40 (West Supp. 2006); *Simms* v. *Royal Thrift & Loan Co.*, No. E028659, 2002 WL 32576, at *6 (Cal. Ct. App. Jan. 11, 2002) (unpub.) (violation is "willful" if "the defendant knowingly failed to fulfill an obligation without a good faith, reasonable belief in the legality of his or her

In addition, petitioners are already subject to punitive damages if they recklessly disregard the requirements of Title VII or the Americans with Disabilities Act. See 42 U.S.C. 1981a; *Kolstad*, *supra*. Reckless disregard is also the standard courts apply under the ADEA for liquidated damages, which are "punitive in nature,"

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actions"); Ariz. Rev. Stat. Ann. § 44-1695(C) (West 2003) ("grossly negligent"); *Armenta* v. *City of Casa Grande*, 71 P.3d 359, 364 (Ariz. Ct. App. 2003) (defining "[g]ross, willful, or wanton conduct" generally as "action or inaction with reckless indifference to the result or the rights or safety of others"); Kan. Stat. Ann. §§ 50-714, 50-715 (1994); *Reeves* v. *Carlson*, 969 P.2d 252, 256-257 (Kan. 1998) (in tort law, "willful" means a person has "knowledge of existing conditions and [is] aware * * * that [harm] will likely or probably result from his or her conduct, and with reckless indifference to the consequences, consciously does some act or omits to discharge some duty, which produces the injurious result"); Me. Rev. Stat. Ann. title 10, § 1320 (West Supp. 2005); *id.* § 1322 (West 1997); *Shrader-Miller* v. *Miller*, 855 A.2d 1139, 1144 (Me. 2004) (In tort law, "willfully" "mean[s] conduct displaying an 'utter and complete indifference to and disregard for the rights of others.'"); Md. Code Ann. Com. Law § 14-1212 (LexisNexis 2005); *id.* § 14-1213 (Supp. 2006); *Williams Constr. Co.* v. *Garrison*, 400 A.2d 22, 25 (Md. Ct. Spec. App. 1979) ("willful[ness] in worker's compensation law includes "the intentional doing of something * * * with a wanton and reckless disregard of its probable consequences"); Mont. Code Ann. §§ 31-3-131, 31-3-142, 33-18-608 (2005); *Cooper* v. *Rosston*, 756 P.2d 1125, 1130 (Mont. 1988) ("When a person knows or has reason to know facts which create a high degree of risk of harm to the substantial interests of another, and * * * recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the standard of willful, wanton, and/or reckless to which the law of this State will allow imposition of punitive damages."); N.Y. Gen. Bus. Law. § 380-i (McKinney 1996); *id.* § 380-*l* (Supp. 2006); *Welch* v. *Mr. Christmas Inc.*, 440 N.E.2d 1317, 1321 (N.Y. 1982) ("[R]ecovery of exemplary or punitive damages in a common-law action requires a showing of conscious disregard of the rights of others or conduct so reckless as to amount to such disregard."); see generally Restatement (Second) of Torts § 908(2) (1979).

Thurston, 469 U.S. at 125, under the Equal Credit Opportunity Act, 15 U.S.C. 1691e(b), and under a number of other federal laws.[15] Indeed, reckless disregard has already been determined to be an adequate shield even in areas of First Amendment concern, see *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).[16]

Finally, the question of how the FCRA responds to covered entities who recklessly disregard the statute's requirements is, at bottom, a question about Congress's level of tolerance for reckless disregard of the law. The FCRA is designed to protect individuals from abuse, to enhance individual privacy, and to promote integrity,

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[15] See, *e.g.*, *Barbour* v. *Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (42 U.S.C. 1981), cert. dismissed, 516 U.S. 1155 (1996); *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 909 (2d Cir. 1993) (Fair Housing Act, 42 U.S.C. 3601 *et seq.*); *United States* v. *Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992) (Fair Housing Act), cert. denied, 510 U.S. 812 (1993); *Asbury* v. *Brougham*, 866 F.2d 1276, 1282 (10th Cir. 1989) (42 U.S.C. 1982); *Stephens* v. *South Atl. Canners, Inc.*, 848 F.2d 484, 489-490, 492 & n.6 (4th Cir.) (42 U.S.C. 1981), cert. denied, 488 U.S. 996 (1988); *Williamson* v. *Handy Button Mach. Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987) (42 U.S.C. 1981); *Fischl* v. *General Motors Acceptance Corp.*, 708 F.2d 143, 148 (5th Cir. 1983) (Equal Credit Opportunity Act).

[16] Petitioner Safeco contends (06-84 Pet. 21) that Congress "implicitly endorse[d]" reading "willfully" to mean knowing violations of the law when it amended the FCRA in 1996 without changing the legal standard. There is nothing in the legislative history that supports that conclusion or, more particularly, that suggests that Congress understood the circuits' "conscious disregard" standard to exclude reckless disregard. Indeed, both the Third and Ninth Circuits have included "reckless disregard" within a "conscious disregard" standard, see 06-84 Pet. App. 127a; *Cushman*, 115 F.3d at 226-227, and other courts have used the phrases interchangeably in this context, see *Casella* v. *Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995), cert. denied, 517 U.S. 1150 (1996), and elsewhere, see, *e.g.*, *Bevolo* v. *Carter*, 447 F.3d 979, 982-984 (7th Cir. 2006); *Stuart* v. *United States*, 337 F.3d 31, 36 (1st Cir. 2003); *United States* v. *Gonsalves*, 435 F.3d 64, 70 (1st Cir. 2006).

efficiency, and reliability in the Nation's banking system. See 15 U.S.C. 1681(a)(1), (4) and (b). In the face of those critical interests, petitioners posit a statutory scheme that cares sufficiently little about non-compliance and the harms that it can cause as to treat ordinary negligence and heedless disregard of the law with equivalent censure. But the FCRA demands, as its starting point, that regulated entities take reasonable measures and strike reasonable balances in exercising their "grave responsibilities," 15 U.S.C. 1681(a)(4) and (b), purposes that cannot be reconciled with petitioners' proposed environment of broad tolerance for companies' reckless indifference to harm and failure to exercise even slight care in complying with the law.

C. Reckless Disregard Requires Indifference To Clearly Established Law Or The Disregard Of An Obvious And High Probability That Conduct Is Unlawful

While the court of appeals correctly held that "willfully" in the FCRA includes a reckless-disregard component, the court misconceived the import of that standard and misapplied it in these cases. For example, the court of appeals held that "implausible" interpretations (06-100 Pet. App. 34a) or knowing reliance on legal opinions "that provide creative but unlikely answers to 'issues of first impression'" (*id.* at 33a) constitute reckless disregard. The court further noted (*id.* at 34a) that whether consultation with attorneys would provide evidence of a lack of willfulness would depend upon the "unreasonableness" of the erroneous interpretation. That resembles a mere negligence standard, and thus sets too low a bar. See *Richland Shoe*, 486 U.S. at 134-135 & n.13.

To be sure, "the term recklessness is not self-defining," *Farmer* v. *Brennan*, 511 U.S. 825, 836 (1994), nor

capable of being cabined into "one infallible definition," *St. Amant* v. *Thompson*, 390 U.S. 727, 730 (1968). "Inevitably its outer limits will be marked out through case-by-case adjudication, as is true for so many legal standards." *Id.* at 730-731. Nevertheless, there are two essential aspects of "reckless disregard" in the civil context that should have guided the court's application.

First, recklessness bespeaks an aggravated or extreme departure from standards of ordinary care. In contrast to negligence, recklessness entails action or inaction "in the face of an *unjustifiably high risk* of harm" or unlawfulness, *Farmer*, 511 U.S. at 836 (emphasis added). The probability that harm or a violation of the law will result must be apparent to a "high degree." *Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 667 (1989). Accordingly, "[t]he usual meaning assigned to * * * 'reckless' * * * is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm [or illegality] would follow." Prosser, *supra*, § 34, at 185; see *Farmer*, 511 U.S. at 837.

Proof of such an aggravated deviation from the standard of ordinary care is necessary because "reckless disregard" is designed to capture two acute forms of culpability. The reckless-disregard standard reaches conduct that is so wrongful under the circumstances that it is a proxy for or functionally equivalent to knowing or intentional conduct, which can in some contexts be difficult to prove.[17] But when couched (as in the FCRA) in terms of

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[17] See, *e.g.*, *Barry* v. *Edmunds*, 116 U.S. 550, 563 (1886) (standard captures that "reckless indifference to the rights of others which is

reckless disregard of the law, the recklessness standard also captures failures to conform behavior to the law that are so extreme as to independently merit censure.[18]

Second, reckless disregard in the civil context is, at bottom, an objective standard. See *Farmer*, 511 U.S. at 836-837; Prosser, *supra*, § 34 at 185 ("an objective standard must of necessity in practice be applied"). That is even more true when, as here, the recklessness standard is framed in terms of compliance with the law, and the statutory standard itself is not necessarily well-established. Although inquiries into recklessness often take place in areas of well-established duties of care, in the statutory context, when the concern is whether the disregard of the law was reckless, the extent to which the law was well-established and clearly understood must be part of the analysis. Therefore, courts must undertake an objective inquiry to determine whether the defendant's conduct reflected a colorable interpretation of the law. But because the standard is recklessness, not negligence, more than mere unreasonableness or implausibility must be shown. See *Richland Shoe*, 486 U.S. at 134-135 & n.13. The plaintiff must demonstrate either that the legal position ran afoul of clearly established law or that

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equivalent to an intentional violation of them"); *Saba* v. *Compagnie Nationale Air France*, 78 F.3d 664, 667-668 (D.C. Cir. 1996) (in some statutes, reckless disregard "provid[es] a proxy" for knowing or intentional conduct, while "alleviat[ing] problems of proof").

[18] See, *e.g.*, *Illinois Cent.*, 303 U.S. at 243 (willfulness encompasses actions that either "intentionally disregard[] the statute or [are] plainly indifferent to its requirements"); *Brock*, 809 F.2d at 164 (in civil cases, a person acts willfully if "the offender shows 'indifference' to the rules; he need not be consciously aware that the conduct is forbidden at the time he performs it, but his state of mind must be such that, if he were informed of the rule, he would not care").

the defendant failed to act with necessary care in the face of a high and obvious risk of legal error. In other words, the defendant's determination of his legal obligations must be shown to have fallen outside the range of responsible judgment.[19] The reckless-disregard component of willfulness thus requires violation of clearly established law or indifference to an objectively high and obvious risk of unlawfulness.[20]

That purely legal inquiry into the objective recklessness of the defendant's failure to comply with the FCRA can, and generally should, be undertaken at an early stage in the case. Only if the defendant's failure to comply with the law was objectively reckless would it become necessary for a court to probe, as the court of appeals invited here (06-100 Pet. App. 33a-34a), the defendant's subjective good faith. Resolving the objective recklessness of the defendant's non-compliance with the law at the outset will (i) help to develop the contours of FCRA law, thereby providing prospective guidance concerning the law's requirements and reducing violations; (ii) "permit the resolution of many insubstantial claims on summary judgment," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); and (iii) minimize the significant intrusions on attorney-client privilege that often attend inquiries into

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[19] In that respect, the test is similar to the qualified-immunity inquiry into whether a defendant's conduct violated "clearly established law." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, this Court has acknowledged the overlap of the qualified-immunity inquiry and the "reckless disregard" standard. See *Smith*, 461 U.S. at 51-54.

[20] Cf. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (to overcome *Noerr-Pennington* immunity in antitrust law, the defendant's litigation position must have been "objectively baseless" and "objectively meritless").

subjective good faith compliance with the law, see 06-100 Pet. App. 34a.

The court of appeals deviated substantially from that framework. The court gave improper significance to allegedly improper motivations at the outset, 06-100 Pet. App. 33a, and inappropriately collapsed the objective and subjective components of recklessness into a single inquiry, inviting immediate inquiry on remand into the privileged advice of counsel, *id.* at 34a. The court also applied too diluted a standard for recklessness, suggesting that it can be satisfied by "unreasonableness," "unlikely answers," or "implausible interpretations," *id.* at 33a-34a. Because the court concluded that "at least some of the [defendants'] interpretations are implausible," and hence reckless under the court's analysis, and because the court ordered the case remanded for further proceedings "consistent with [its] opinion" setting forth an incorrect articulation of the governing recklessness standard (*id.* at 34a, 36a; see 06-84 Pet. App. 2a), the court's judgments cannot stand.

II. AN ADVERSE ACTION NOTICE IS REQUIRED WHEN THE CONTENT OF A CONSUMER'S CREDIT REPORT PREVENTED THE CONSUMER FROM OBTAINING A BETTER INSURANCE RATE

A. Providing A Higher Insurance Rate Based, In Part, On A Credit Report Constitutes An Adverse Action

The court of appeals correctly concluded in No. 06-100 (Pet. App. 20a-21a) that GEICO took an adverse action against Edo. The FCRA defines an adverse action in the insurance context as:

> a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable

> change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. 1681a(k)(1)(B)(i).[21]

GEICO concedes (06-100 Pet. App. 10a) that charging a new customer a higher rate than that available to other customers based, at least in part, on the customer's credit report can constitute an "increase in a[] charge for [insurance] * * * applied for," 15 U.S.C. 1681a(k)(1)(B)(i), and thus an adverse action. That concession was a wise one. The plain meaning of "increase" is "to become" or "to make" "greater in some respect." *Webster's Third New Int'l Dictionary* 1145 (1961); see *Webster's New Int'l Dictionary* 1260 (2d ed. 1958). When an insurer charges one new customer more than others based, at least in part, on the content of the customer's credit report, it requires no linguistic leaps to conclude that the insurer has "increase[d]" the insurance charge for that customer.

Nothing in the meaning or usage of that term in the FCRA presupposes that the baseline for determining whether a rate is greater must be a price previously paid by the same customer himself, as opposed to the price offered to others.[22] The FCRA's prohibitions are not

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[21] The FCRA defines "adverse action" differently depending on the type of transaction involved (*i.e.*, insurance, credit, employment, or licensing). See 15 U.S.C. 1681a(k)(1). This case concerns only the insurance provision.

[22] See 16 C.F.R. Pt. 600 App., at 519 (notice required if any adverse action is taken, even if the information is non-derogatory); 16 C.F.R. Pt. 698 App. H, at 552 (Notice of User Responsibilities) ("'adverse action' is defined very broadly" and includes any decision "hav[ing] a negative impact"); S. Rep. No. 209, 103d Cong., 1st Sess. 4, 8 (1993) (adverse action notice required "any time the permissible use of a report results

limited to repeat customers. Nor is such a reading required by common usage. Had Edo pulled into a gas station and been charged ten cents a gallon more because of his race, gender, or the fact that his license plate ended in an odd, rather than an even, number, Edo would have suffered an "increase[d]" charge for gasoline, regardless of whether he had ever purchased gasoline at that station before. See *Cornist* v. *B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001) (a charge imposed on credit purchasers of new cars was an "increase" over the price charged to cash customers).

GEICO argues (06-100 Pet. 25-29) that no adverse action occurred because it determined after the fact that Edo's rate would have been the same if no credit report had been requested and GEICO had instead applied a neutral credit score. GEICO does not dispute, however, that it, in fact, obtained and used Edo's actual credit score and, on that basis, charged him a higher rate for insurance than what was offered to certain other customers and what would have been offered to him if his credit score had been better. 06-100 Pet. App. 11a-12a, 14a. What GEICO *would have done* in the absence of a credit report is beside the point, because what GEICO *did*—use a credit report adversely without providing notice—violated the statute.[23]

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in an outcome adverse to the interests of the consumer"); H.R. Rep. No. 486, 103d Cong., 2d Sess. 26 (1994) (same); S. Rep. No. 517, *supra*, at 7 (adverse action notice required whenever a consumer is "charged a higher rate for * * * insurance" because of his credit report).

[23] Indeed, had GEICO not intended to use Edo's report in connection with the underwriting of insurance, such as to set his insurance rate, it would have obtained the report without any permissible purpose, in violation of 15 U.S.C. 1681b(a) (Supp. IV 2004).

Nothing in the FCRA conditions the existence of an adverse action on the absence of *post hoc* rationales for the higher rate. By the statute's plain terms, an "adverse action" requires nothing more than that the insurance company "take[] any adverse action," 15 U.S.C. 1681m(a)—such as an "increase" in the charge for insurance, 15 U.S.C. 1681a(k)(1)(B)(i)—"based in whole or in part on any information contained in a consumer report." 15 U.S.C. 1681m(a). If it does, an adverse action notice is required. *Ibid.* Properly understood, therefore, the adverse action occurred and was completed the moment Edo's insurance rate was set at a higher and less-preferable level based, at least in part, on his credit report—and, at that point, the obligation to issue an adverse-action notice was triggered. See *TRW*, 534 U.S. at 35 (under the FCRA, "[p]unitive damages * * * could presumably be awarded at the moment of TRW's alleged wrongdoing," regardless of whether and when actual damages might be established); cf. *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995).

Indeed, GEICO's position defies the statutory text and purpose. The FCRA's definition of an adverse action focuses on whether the credit report had a negative effect on Edo's insurance rate, not whether his rate nevertheless fell within some statistical median or "neutral" insurance rate for customers of similar backgrounds. GEICO's after-the-fact evidence may speak to whether actual damages accrue, *McKennon*, 513 U.S. at 360-362, but it says nothing about whether an adverse action was, in fact, taken based on his credit report.

Furthermore, the purpose of the adverse action notice is not to alert consumers only when a report is below average; it is to advise any affected consumer that the information in his report is not as good as it might be and

that the deficiency has had material consequence. Under the FCRA, each consumer plays a pivotal role in assuring the accuracy of his or her consumer report and thereby contributes to the integrity of the system as a whole. See *Philbin* v. *Trans Union Corp.*, 101 F.3d 957, 962 (3d Cir. 1996) (noting "the detrimental effects inaccurate information can visit upon both the individual consumer and the nation's economy as a whole"). It is the adverse action notice that generally triggers the consumer's role. In the absence of such notice, there may be nothing to alert the consumer to check the report and no information as to how to check a report. A consumer with perfect credit who should receive a discount, but instead is charged a higher rate based on a mistaken report that her credit is average is no less entitled to notice than a consumer with average credit who is charged a higher-than-average rate based on a mistaken report of a poor credit history.

Moreover, the obligation to provide notice is a consequence GEICO chose for itself. Nothing in federal law requires insurance companies to use credit reports in setting their rates. The FCRA simply requires that, if an insurance company opts to use the credit reporting system and enjoy its benefits, it must also comply with the FCRA's obligations. That ensures that the other side of the balance—the consumer's interest in being alerted when his credit rating denies him a benefit and the financial system's interest in ensuring the accuracy and integrity of consumer information—is maintained.

Safeco's and GEICO's concerns (06-84 Pet. 24; 06-100 Pet. 25-29) about the policy implications of applying the adverse action definition as it is written are neither well-founded nor properly directed. For the past four years, GEICO has been providing the requisite notices, without

any evidence of paralysis or unworkability induced by its compliance with the FCRA. 06-100 Pet. App. 14a. And in any event, petitioners could avoid the FCRA's obligations by not relying upon credit reports. Beyond that, objections to the requirements of the FCRA should be directed to Congress.

B. GEICO's Erroneous Understanding Of The Adverse Action Provision Was Not Willful

While GEICO erred in concluding that no adverse action report was required in Edo's situation, the district court's grant of summary judgment was proper because GEICO's departure from the FCRA's terms was not objectively reckless. The question whether an "increase[d]" charge can be made for any initial application for insurance was itself an issue of first impression, 06-100 Pet. App. 17a, and the legal novelty of that question was compounded in Edo's case because there was an alternative justification for the rate.

In addition, the statutory text is not so pellucid on the question as to render GEICO's position an extreme departure from the bounds of responsible judgment, as evidenced by the district court's judgment in GEICO's favor (06-100 Pet. App. 46a). See *id.* at 38a n.1 (describing GEICO's arguments as "well-reasoned and thoughtful"). Generally, "[i]f judges * * * disagree on a [legal] question, it is unfair to subject [defendants] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Nor had the Commission provided specific formal guidance on the question. Cf. *Thurston*, 469 U.S. at 129-130 (airlines' position not reckless where legal advice was sought and

position was within the range of reason).[24] Nothing in the statute's text, its established interpretation, agency guidance, court decisions, or the facts of the situation made it apparent that there was an objectively high risk that GEICO's construction of the law was wrong. As a result, GEICO's position did not reflect such an extreme departure from the range of responsible judgment as to be either tantamount to a knowing violation of the law or to reflect such heedless disregard of its duty to comply with the law as to be commensurately culpable.

CONCLUSION

The judgment of the court of appeals in No. 06-84 should be vacated and remanded, and the judgment in No. 06-100 should be reversed.

Respectfully submitted.

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NOVEMBER 2006

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[24] Commission staff had provided informal guidance advising that denying a new customer a better insurance rate wholly or partly because of information in the customer's credit report is an adverse action. See Letter from Hannah Stires, FTC, to James Ball (Mar. 1, 2000) <http://www.ftc.gov/os/statutes/fcra/ball.htm>.

APPENDIX

The following Sections are found in Title 15 of the United States Code.

§ 1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures.

It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard

to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

§ 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer report.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness,[1] credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

* * * * *

[1] So in original. Probably should be "creditworthiness,".

(k) ADVERSE ACTION.—

(1) ACTIONS INCLUDED.—The term "adverse action"—

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means—

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is—

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) APPLICABLE FINDINGS, DECISIONS, COMMENTARY, AND ORDERS.—For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

* * * * *

§1681b. Permissible purposes of consumer reports

(a) In general

Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information—

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that—

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under Section 454 of the Social Security Act (42 U.S.C. § 654) for use to set an initial or modified child support award.

* * * * *

§ 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall—

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically—

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains

files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right

(A) to obtain, under section 612 [§ 1681j], a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 611 [§ 1681i], with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies

(1) In general

Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness,[1] credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information

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[1] So in original. Probably should be "creditworthiness,".

shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate

(A) Duties, generally

If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall—

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described

An action referred to in subparagraph (A) is an adverse action described in section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1861a(k)(1)(B) of this title.

(C) Information described

Information referred to in subparagraph (A)—

(i) except as provided in clause (ii), is information that—

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on the basis of information obtained in consumer files

(1) In general

Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that

is provided to that person under section 1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that—

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness[2] or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

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[2] So in original. Probably should be "creditworthiness".

(2) Disclosure of address and telephone number; format

A statement under paragraph (1) shall—

(A) include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title; and

(B) be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration.

(3) Maintaining criteria on file

A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected

This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

(e) Red flag guidelines and regulations required

(1) Guidelines

The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title—

(A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary;

(B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers; and

(C) prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures—

(i) notifies the cardholder of the request at the former address of the cardholder and provides to

the cardholder a means of promptly reporting incorrect address changes;

(ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or

(iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(2) Criteria

(A) In general

In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.

(B) Inactive accounts

In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies and procedures that provide for notice to be given to a consumer in a manner reasonably designed to reduce the likelihood of identity theft with respect to such account.

(3) Consistency with verification requirements

Guidelines established pursuant to paragraph (1) shall

not be inconsistent with the policies and procedures required under section 5318(*l*) of title 31.

(f) Prohibition on sale or transfer of debt caused by identity theft

(1) In general

No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 605B has resulted from identity theft.

(2) Applicability

The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).

(3) Rule of construction

Nothing in this subsection shall be construed to prohibit—

(A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;

(B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or

(C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.

(g) Debt collector communications concerning identity theft

If a person acting as a debt collector (as that term is defined in subchapter V of this chapter on behalf of a third party that is a creditor or other user of a consumer

report is notified that any information relating to a debt that the person is attempting to collect may be fraudulent or may be the result of identity theft, that person shall—

(1) notify the third party that the information may be fraudulent or may be the result of identity theft; and

(2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.

(h) Duties of users in certain credit transactions

(1) In general

Subject to rules prescribed as provided in paragraph (6), if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with this subsection.

(2) Timing

The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or

grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).

(3) Exceptions

No notice shall be required from a person under this subsection if—

(A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or

(B) the person has provided or will provide a notice to the consumer under subsection (a) of this section in connection with the transaction.

(4) Other notice not sufficient

A person that is required to provide a notice under subsection (a) of this section cannot meet that requirement by providing a notice under this subsection.

(5) Content and delivery of notice

A notice under this subsection shall, at a minimum—

(A) include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report;

(B) identify the consumer reporting agency furnishing the report;

(C) include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge; and

(D) include the contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in section 603(p) of this title.

(6) Rulemaking

(A) Rules required

The Commission and the Board shall jointly prescribe rules.

(B) Content.

Rules required by subparagraph (A) shall address, but are not limited to—

(i) the form, content, time, and manner of delivery of any notice under this subsection;

(ii) clarification of the meaning of terms used in this subsection, including what credit terms are material, and when credit terms are materially less favorable;

(iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;

(iv) a model notice that may be used to comply with this subsection; and

(v) the timing of the notice required under paragraph (1), including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.

(7) Compliance

A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.

(8) Enforcement

(A) No civil actions

Sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement.

This section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section.

§ 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

§ 1681*o*. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

§ 1681p. Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this title may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of—

(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or

(2) 5 years after the date on which the violation that is the basis for such liability occurs.

§ 1681q. Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, imprisoned for not more than 2 years, or both.

§ 1681r. Unauthorized disclosures by officers or employees

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under Title 18, United States Code, imprisoned for not more than 2 years, or both.

§ 1681s. Administrative enforcement

(a) Enforcement by Federal Trade Commission.

(1) Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act [15 U.S.C.A. 41 et seq.] by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)] and shall be subject to enforcement by the Federal Trade Commission under section 5(b) thereof [15 U.S.C. 45(b)] with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets

any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title. Any person violating any of the provisions of this title shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this title.

(2)(A) In the event of a knowing violation, which constitutes a pattern or practice of violations of this title, the Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this title. In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation.

(B) In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(3) Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 1681s-2(a)(1) of this title unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and

the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.

(b) Enforcement by other agencies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of section 1681m of this title shall be enforced under

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act [12 U.S.C. 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part, and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this title, the State—

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover—

(i) damages for which the person is liable to such residents under sections 1681n and 1681*o*] as a result of the violation;

(ii) in the case of a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, damages for which the person would, but for section 1681s-2(c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than $1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Federal regulators

The State shall serve prior written notice of any action under paragraph (1) upon the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) of this section and provide the Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Federal Trade Commission or appropriate Federal regulator shall have the right—

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(3) Investigatory powers

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation on State action while Federal action pending

If the Federal Trade Commission or the appropriate Federal regulator has instituted a civil action or an administrative action under section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818] for a violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission or the appropriate Federal regulator for any violation of this title that is alleged in that complaint.

(5) Limitations on State actions for certain violations

(A) Violation of injunction required

A State may not bring an action against a person under paragraph (1)(B) for a violation described in any

of paragraphs (1) through (3) of section 1681s-2(c) of this title, unless—

(i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and

(ii) the person has violated the injunction.

(B) Limitation on damages recoverable

In an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, a State may not recover any damages incurred before the date of the violation of an injunction on which the action is based.

(d) Enforcement under other authority

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

(e) Regulatory authority

(1) The Federal banking agencies referred to in paragraphs (1) and (2) of subsection (b) of this section shall jointly prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraphs (1) and (2) of subsection (b) of this section, and the Board of

Governors of the Federal Reserve System shall have authority to prescribe regulations consistent with such joint regulations with respect to bank holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies.

(2) The Board of the National Credit Union Administration shall prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraph (3) of subsection (b) of this section.

(f) Coordination of consumer complaint investigations

(1) In general

Each consumer reporting agency described in section 1681a(p) of this title shall develop and maintain procedures for the referral to each other such agency of any consumer complaint received by the agency alleging identity theft, or requesting a fraud alert under section 1681c-1 of this title A or a block under section 1681c-2 of this title.

(2) Model form and procedure for reporting identity theft

The Commission, in consultation with the Federal banking agencies and the National Credit Union Administration, shall develop a model form and model procedures to be used by consumers who are victims of identity theft for contacting and informing creditors and consumer reporting agencies of the fraud.

(3) Annual summary reports

Each consumer reporting agency described in section 1681a(p) of this title shall submit an annual summary

report to the Commission on consumer complaints received by the agency on identity theft or fraud alerts.

(g) FTC regulation of coding of trade names

If the Commission determines that a person described in paragraph (9) of section 1681s-2(a) of this title has not met the requirements of such paragraph, the Commission shall take action to ensure the person's compliance with such paragraph, which may include issuing model guidance or prescribing reasonable policies and procedures, as necessary to ensure that such person complies with such paragraph.

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FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*, *Petitioners*,

v.

CHARLES BURR, *et al.*, *Respondents*.

GEICO GENERAL INSURANCE COMPANY, *et al.*, *Petitioners*,

v.

AJENE EDO, *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a defendant can be found liable for a "willful" violation of the Fair Credit Reporting Act upon a finding of "reckless disregard" for the FCRA's requirements, absent a finding that the defendant knew its conduct violated the FCRA.

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INTEREST OF AMICUS CURIAE[1]

The American Insurance Association (AIA) is a national trade association representing companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA members underwrite over $120 billion in premiums each year and provide coverage in a broad range of personal and commercial lines of business. AIA regularly appears in judicial proceedings to inform courts about the implications of legal developments for its members. AIA participated in the Ninth Circuit, and at the certiorari stage in this Court, as amicus curiae in support of Petitioners.

Overturning the Ninth Circuit's interpretation of the Fair Credit Reporting Act (FCRA) is extremely important to AIA members. The Ninth Circuit's construction of the decades-old statute as imposing requirements on insurance companies that no court previously recognized, and its indication that defendants might be found liable for "willfully" violating these unprecedented requirements, despite their good-faith compliance efforts, threaten AIA members with substantial and severe liability.

STATEMENT

In the 1990s, many insurers began using credit-based insurance scores—scores derived from credit report information—in underwriting and pricing personal lines of insurance. The use of such scores enables insurers to rate insurance risks more accurately and, thus, to avoid subsidization by some consumers of the higher risks presented by other consumers. The more accurate classification of risk translates into lower premiums for many consumers and increased availability of coverage.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amicus curiae states that no counsel for a party authored this brief in whole or in part. No person or entity, other than amicus curiae and its members, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

The FCRA requires an entity that "takes any adverse action . . . based in whole or in part on any information contained in a consumer report" to issue an adverse-action notice to the affected consumer. 15 U.S.C. § 1681m(a). Each insurance company using insurance scores made a determination of what triggered its FCRA duty to provide adverse-action notices. Separate determinations made by different insurers, often on advice of counsel, resulted in various practices. Given the absence of any court decisions interpreting the FCRA's insurance adverse-action definition—15 U.S.C. § 1681a(k)(1)(B)(i)—or any binding agency regulations, insurers conformed their practices to their good-faith interpretations of the FCRA's text and any applicable state-law requirements.

Many insurers reasonably determined that the FCRA did not require adverse-action notices upon the setting of an initial rate for insurance and, accordingly, for a number of years, did not provide notices in such circumstances. Few, if any, insurers construed the FCRA to require adverse-action notices in the broad "best rate" circumstances now required by the Ninth Circuit—*i.e.*, whenever an insurer's consideration of a consumer's insurance score leads the insurer to set a higher insurance rate than the insurer would have set had it considered a hypothetical consumer with a top insurance score. Rationally construing the statute, many insurers instead determined the adverseness of using a consumer's credit report by isolating that use and its effect on a consumer's rate. In other words, insurers sought to identify when their use of a consumer's insurance score led them to set a higher insurance rate than would have been set had they not considered the score at all, and then issued adverse-action notices in those circumstances. It would have contradicted common sense to adopt the "best rate" construction and notify numerous consumers that they had been adversely affected when consideration of their insurance scores either had not affected their rates or had led to lower rates.

Many insurance company groups operate in an economically efficient, integrated fashion, in which a separate and distinct corporate entity provides centralized insurance, financial, technological, and management services to affiliated issuing insurers through written agreements. Often, this separate corporate entity obtains consumers' insurance scores and applies previously established rating criteria to determine an appropriate premium. Sometimes, a consumer's rate is affected by the placement of the consumer with one of several insurer affiliates within an integrated company group (where the affiliates offer different rating levels). Amicus knows of no company that believed, prior to the Ninth Circuit's decision, that entities other than the affiliated insurer that actually issued the relevant policy (or the affiliated entity that was responsible for denying coverage for the integrated company group altogether) must issue adverse-action notices.

In 2001 and 2002, a group of consumers initiated eight putative nationwide class actions in federal district court, alleging that Petitioners' and other insurers' adverse-action notice practices contravened the FCRA's requirements.[2] The complainants did not allege that they had suffered any actual damages, which a plaintiff must show to recover for a "negligent" violation of the FCRA. 15 U.S.C. § 1681o. Instead, the complainants sought the extraordinary remedy of statutory and punitive damages under § 1681n, which states that "[a]ny person who *willfully* fails to comply with any requirement imposed under [the Act] with respect to any consumer is liable to that consumer" for statutory damages of

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[2] *Ashby* v. *FICO*, CV 01-1446-BR (filed Sept. 28, 2001); *Willes* v. *State Farm Fire & Casualty*, CV 01-1457-BR (filed Oct. 1, 2001); *Spano* v. *Safeco Ins. Co. of Or.*, CV 01-1464-BR (filed Oct. 2, 2001); *Dikeman* v. *Progressive Corp.*, CV 01-01465-BR (filed Oct. 2, 2001); *Razilov* v. *AMCO Ins. Co.*, CV 01-1466-BR (filed Oct. 3, 2001); *Rausch* v. *Hartford Fin. Servs. Group*, CV 01-1529-BR (filed Oct. 16, 2001); *Mark* v. *Valley Ins. Co.*, No. CV01-1575-BR (filed Oct. 24, 2001); *Edo* v. *GEICO Cas. Co.*, CV 02-678-BR (filed May 24, 2002).

$100 to $1000, punitive damages, and attorneys fees. 15 U.S.C. § 1681n(a) (emphasis added).

The district court, addressing questions of national first impression, concluded in one of the cases that only the insurance affiliate to which a consumer applies can "take" an adverse action and therefore incur an obligation to issue a notice. *Willes* v. *State Farm Fire & Cas. Co.*, CV 01-1457-BR (D. Or. Sept. 9, 2003), *reprinted in* Pet. App., *State Farm Mut. Auto. Ins. Co.* v. *Willes*, No. 06-101, at 74a-75a (U.S. filed July 19, 2006). In another case, the court held that an "adverse action" does not occur when an insurer, on the basis of information in a consumer's credit report, sets an initial rate that is higher than the best available rate. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1318-1319 (D. Or. 2003). And, in yet another case, the court held that, at a minimum, no adverse action occurs when an insurer sets a rate that is the same as the rate it would have set had the consumer's credit report not been considered. *See* GEICO Pet. App. 39a, 46a. On appropriate motions, the court granted summary judgment to the insurers. At the time, the district court's decisions on these questions were the first and only reported opinions addressing the application of the FCRA's adverse-action notice requirement in this insurance context. *See id.*; *Spano* v. *SAFECO Ins. Co.*, 215 F.R.D. 601 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977 (D. Or. 2003).

Respondents in the two cases at bar, and the plaintiffs in the other similar cases, appealed to the Ninth Circuit. After three tries, spanning a five-month period during which the Ninth Circuit amended its decision twice in response to petitions for rehearing, the court of appeals reversed and remanded.

In its first try—an opinion issued August 4, 2005—a divided Ninth Circuit panel reversed the district court on each

of the FCRA issues described above.[3] In particular, the court of appeals held that an adverse action occurs when an insurer sets an initial rate that is higher than the rate the consumer would have been offered if his credit score had been better, and that any insurance entity with any relation to a rate or coverage decision for that consumer is obligated to send an adverse-action notice. Pet. App. 48a-54a, 57a-60a.[4]

The Ninth Circuit also rejected Petitioners' arguments that they were entitled to summary judgment because any alleged noncompliance could not have been "willfu[l]" under § 1681n. Pet. App. 65a-66a. The court construed the "willfulness" standard to encompass not only "conscious disregard" of known legal obligations, but also "recklessness." *Id.* at 62a. The court further found that a defendant may act "recklessly" if it adopts "unreasonable answers to issues of first impression" under the FCRA. *Id.* at 64a. Two members of the panel went further, concluding (apparently as a matter of law) that Petitioners' interpretations had been so "objectively unmeritorious" that they were reckless, and thus willful. *Id.* at 64a-65a. The panel majority did not explain how its conclusion could account for the fact that the district court—another Article III tribunal—had concluded that the FCRA "unambiguous[ly] and plainly" supported Petitioners' constructions of the statute. *Mark*, 275 F. Supp. 2d at 1318. Judge Bybee dissented, explaining that he "would not decide, as a matter of fact or law, that the insur-

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[3] The Ninth Circuit issued its primary decision in two consolidated cases—*Reynolds* v. *Hartford Financial Services Group, Inc.*, No. 03-35695, and *Edo* v. *GEICO Casualty Co.*, No. 04-35279. The court then resolved the appeal of Petitioner Safeco in an unpublished disposition, relying on the decision in the consolidated *Reynolds* and *Edo* cases. This brief uses the term "decision below" to refer to the Ninth Circuit's third decision under the consolidated *Reynolds* and *Edo* caption. *See infra* pp. 6-7.

[4] In this brief, citations to the "Pet. App." are to the Appendix to the Petition for Certiorari for Safeco Insurance Company unless otherwise indicated.

ance companies acted willfully" without further examination of that question. Pet. App. 67a-68a.

Joined by several amici, including the AIA, Petitioners sought rehearing en banc, noting that the Ninth Circuit's holding that adherence to an "unreasonable" legal interpretation may constitute willful noncompliance directly contradicted decisions of this Court. *See, e.g.*, Br. for Amici Curiae AIA and NAMIC in Support of Pet. for Reh'g En Banc 5-6 (citing *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (rejecting the proposition that "a finding of unreasonableness [would] suffice as proof of" willfulness), and *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 616 (1993)). In response, the Ninth Circuit issued an amended opinion that reached the same result but, without explanation, removed the words "reasonable" and "unreasonable" from its first decision and replaced them with the synonyms "tenable," "indefensible," and "implausible." Pet. App. 69a-99a. Judge Bybee again dissented. *Id.* at 99a-101a.

Petitioners once more sought rehearing en banc, and the Ninth Circuit issued another amended opinion. In its third try, the court retreated from its *sua sponte* finding that Petitioners had acted in willful noncompliance, instead remanding to the district court to decide whether Petitioners had "willfully" violated the FCRA. Pet. App. 129a. The court appeared to set forth a two-step framework for addressing that question under its "recklessness" standard: First, a court should determine whether a defendant adopted an interpretation of the FCRA that the court (in hindsight) finds "implausible." *Id.* If so, the court must then examine the "obviousness or unreasonableness of the erroneous interpretation" and, "[i]n some cases," "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* The Ninth Circuit noted that it found "some" of Petitioners' FCRA interpretations "implausible," without further specification, thus requiring the additional "recklessness" inquiry on remand. *Id.* The Ninth Circuit did not, however, specify how the district court should apply or otherwise employ the "un-

reasonableness" or "company[] decision" factors, what weight should be accorded each, or when examination of the second is even appropriate.

SUMMARY OF ARGUMENT

The decision below adopts an erroneous interpretation of the term "willfully" as used in 15 U.S.C. § 1681n(a). Amicus urges this Court to correct that construction for two primary reasons.

First, the Ninth Circuit's construction of the willful noncompliance provision as imposing a broad and loosely defined "recklessness" standard departs severely from the text and purpose of § 1681n(a). The true content and contours of the Ninth Circuit's "recklessness" standard can best be gleaned from the court of appeals' application in these very cases. The Ninth Circuit held that a court may find a defendant to have recklessly disregarded the FCRA even in circumstances where all of the following are true: (1) the text of the FCRA supports the defendant's construction or is at least ambiguous on the relevant issue; (2) the defendant construes the statute without the benefit of judicial precedent or binding agency determinations interpreting the statute's application to the relevant issue; (3) the defendant adopts a reasonable construction of the statute, which is later adopted by the first federal court to consider the relevant issue; and (4) the first court to construe the statute differently is the court of appeals in the very case challenging the relevant practice as a willful statutory violation, and the court of appeals does so only because it settles upon a novel interpretation of the relevant FCRA provision. As a result, instead of properly confining statutory and punitive damages under § 1681n(a) to egregious violations of the FCRA, the Ninth Circuit's "recklessness" construction authorizes the award of extraordinary damages even in cases in which a defendant's construction of the statute is objectively reasonable.

Second, the "recklessness" standard threatens substantial harm to the insurance industry. If allowed to stand, the

decisions below will authorize the imposition of staggering, class-based statutory and punitive damages in cases where consumers do not even claim to have suffered any actual damages. The potential damage awards would have severe consequences for insurers and consumers alike. Moreover, because questions of first impression regarding the FCRA may frequently arise in other insurance contexts, insurers will face the threat of similarly costly class-action litigation and liability for any interpretation of the Act that a court later deems "implausible." The Ninth Circuit's erroneous interpretation will also affect the many other businesses that routinely make use of consumer credit information. It is critical that this Court overturn the Ninth Circuit's interpretation to protect personal-lines insurers and other businesses from substantial damages that Congress never intended to impose.

ARGUMENT

I. THE NINTH CIRCUIT'S CONSTRUCTION OF "WILLFULLY" IN 15 U.S.C. § 1681n(a) AS IMPOSING BROAD AND LOOSELY-DEFINED RECKLESSNESS LIABILITY IS ERRONEOUS

A. The FCRA "Willful Noncompliance" Provision Limits Statutory And Punitive Damages To Egregious Violations Of The Act

Congress provided individuals with two primary private remedies for a defendant's violation of the FCRA. First, individuals may recover actual damages and reasonable attorneys fees for a defendant's "negligent noncompliance." 15 U.S.C. § 1681o. Second, in the more egregious circumstances where a defendant "*willfully* fails to comply" with the statute, Congress authorized a private right of action to recover statutory damages of $100 to $1000, punitive damages, and reasonable attorneys fees. *Id.* § 1681n(a).[5] The statutory text thus reserves the more substantial damages for those defendants whose culpability is most significant.

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[5] The FCRA also separately authorizes government enforcement of statutory requirements. *See* 15 U.S.C. § 1681s.

AIA concurs with the position taken by the majority of the courts of appeals—that Congress intended to limit liability under § 1681n(a) to those who "knowingly and intentionally commit[] an act in conscious disregard for the rights of the consumer." *Ausherman* v. *Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003).[6]

As Petitioners persuasively demonstrate, the legislative history demonstrates that Congress deliberately chose a narrow scope for the "willful noncompliance" provision, rejecting alternative legislative drafts that would have permitted the recovery of statutory and punitive damages for a broader scope of conduct—*i.e.*, both grossly negligent and willful violations. *See* H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970); *see also* Safeco Pet. Br. 25-26; GEICO Pet. Br. 33. The "knowing[] and intentional[]" construction both adheres to the statutory text and best reflects Congress's purpose in creating two separate private rights of action, in which the most substantial damages (and the *only penalties*) are reserved for the most culpable defendants. Congress intended less culpable transgressions, like those alleged to have occurred in these cases, to be remedied by private actions for "negligent noncompliance" or enforcement actions—not through the imposition of staggering, class-based statutory and punitive damages.

B. The Erroneousness Of The "Recklessness" Construction Is Apparent In The Ninth Circuit's Application Of The Standard

The true content and contours of the "recklessness" construction—and its danger—can best be discerned from the Ninth Circuit's application of the standard in these cases. Under that construction, statutory and punitive damages

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[6] *See also, e.g.*, *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357, 368 (8th Cir. 2002); *Cousin* v. *Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Casella* v. *Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995); *Zamora* v. *Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (*per curiam*).

would not be reserved for only the most culpable violations of the FCRA, as Congress intended, but rather could be imposed in even the most blameless of circumstances.

According to the Ninth Circuit, a defendant can "willfully" violate an FCRA statutory provision under its "recklessness" construction even where, as here, all of the following are true: (1) the text of the FCRA supports the defendant's construction or is at least ambiguous on the relevant issue; (2) there are no existing judicial decisions or binding agency regulations interpreting the FCRA to guide the defendant to a particular construction; (3) the defendant adopts a reasonable construction that is later adopted and confirmed by the first federal district court to consider the question; and (4) the defendant is subsequently found to have violated the statute only because it did not adopt a novel and unforeseeable construction of the statute, first announced in an appeal in the very case seeking statutory and punitive damages for the alleged willful noncompliance. Imposition of statutory and punitive damages in these circumstances is entirely inconsistent with the text and purpose of § 1681n(a).

1. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Determining Not To Send Notices Upon The Setting Of An Initial Insurance Rate

The Ninth Circuit's first departure from the text and purpose of § 1681n(a) is apparent in its conclusion that Petitioners could have "willfully" violated the FCRA by interpreting the adverse-action notice requirement not to apply to the setting of initial insurance rates.

The FCRA requires "users of consumer reports," including insurers, to provide notice to a consumer of "any adverse action . . . based in whole or in part on . . . a consumer report." 15 U.S.C. § 1681m(a)(1). An "adverse action" in the insurance context, in turn, is defined as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connec-

tion with the underwriting of insurance." *Id.* § 1681a(k)(1)(B)(i). The Ninth Circuit held that the establishment of an initial rate is covered by the statutory phrase "'increase in any charge' . . . for insurance." Pet. App. 114a. In particular, the court concluded that an insurer "increase[s]" a "charge" for insurance, based on a credit report, when the insurer "charg[es] a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report." *Id.* (emphasis added).

The Ninth Circuit's reading is contrary to the plain meaning of the statutory text. The court recognized that "'[i]ncrease' means to make something greater." Pet. App. 114a. Yet one cannot make "something" greater if that "something"—here a rate for the consumer—does not yet exist. This is not only the natural use of "increase," but also the way numerous courts, including the Ninth Circuit itself, previously have used the term.[7]

The Ninth Circuit rejected this customary meaning of "increase" based on a phrase found later in the "adverse action" definition: "any insurance, existing or applied for." The court assumed that Congress intended each of the various actions described in § 1681a(k)(1)(B)(i)—*e.g.*, "denial," "increase"—to modify both "existing" and "applied for" insurance. Pet. App. 115a.

That assumption is erroneous. The Ninth Circuit's reading ignores the reality that most of the actions described in § 1681a(k)(1)(B)(i) make sense only when read to modify either "existing" or "applied for" insurance, but not

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[7] *See Certain Underwriters at Lloyd's* v. *Montford*, 52 F.3d 219, 221 (9th Cir. 1995) ("The insured value . . . was initially set at $925,000, and was [later] increased to $1,050,000[.]"); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 558 (1962) (plurality op.); *Bernklau* v. *Principi*, 291 F.3d 795, 798 (Fed. Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1016 (10th Cir. 2002); *United States* v. *Schallom*, 998 F.2d 196, 199 (4th Cir. 1993) (*per curiam*); *United States* v. *Golden*, 954 F.2d 1413, 1415 (7th Cir. 1992).

both. For example, "cancellation" naturally modifies only "existing" insurance, as in the cancellation of an existing insurance policy based on information learned from a customer's credit report. One cannot "cancel" something that does not exist. The term "denial," on the other hand, naturally modifies only insurance that a consumer has "applied for," as in the denial of an application for insurance based on information in the applicant's credit report. Thus, insurers could reasonably interpret § 1681a(k)(1)(B)(i) as requiring notices for

- a "denial" of an "appli[cation]" for insurance,
- a "cancellation" of "existing" insurance,
- an "increase in any charge for . . . existing" insurance, or
- "a reduction or other adverse or unfavorable change in the terms of coverage or amount of . . . existing" insurance.

By stretching the term "increase" to modify both "existing" and "applied for" insurance, the Ninth Circuit effectively interpreted "increase" to mean establishing an insurance "charge" that does not yet exist and doing so at a level higher than might have been set under different circumstances. That reading strains the straightforward reading of the term.

The insurers' and district court's interpretation of the adverse-action notice requirement not to apply to the establishment of initial rates is far more faithful to the statutory text. Nevertheless, even were the Ninth Circuit correct, it stretches the willful noncompliance provision of § 1681n(a) beyond its properly limited sphere to hold that the contrary interpretation reached by the insurers and the district court amounts to a willful failure to comply with the FCRA. Insurers adopted their good-faith construction of the ambiguous adverse-action definition in the absence of any judicial precedent or binding agency regulations on the issue. Their interpretation in that context was more than reasonable, as demonstrated by the history of these cases. The district

court, in the first reported opinion to confront the issue, *agreed* with the insurers. *See Mark*, 275 F. Supp. 2d at 1318-1319. The Ninth Circuit's finding that a "recklessness" (and thus, willfulness) finding could be justified in these circumstances persuasively demonstrates why the "recklessness" construction of § 1681n(a) cannot be correct.

2. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Determining Not To Send Notices To All Persons Receiving Less Than The Best Rate

The Ninth Circuit's next departure is apparent in its conclusion that Petitioners could have "willfully" violated the FCRA by interpreting the adverse-action requirement differently from the Ninth Circuit's novel "best rate" construction. That "best rate" construction is not only far from obvious, it is in fact erroneous.

The text of the FCRA makes plain that a change in the terms of insurance is "adverse" if, as a result of the use of a credit report, the consumer is placed in a worse position. "Adverse" is commonly understood to mean "contrary to one's interests or welfare; harmful or unfavorable." *The American Heritage Dictionary of the English Language* (3d ed. 1992). Based on this ordinary meaning, many insurers reasonably interpreted the FCRA to require an adverse-action notice only when they set a rate, upon consideration of a consumer's credit report, higher than the rate they would have set had they not considered the consumer's credit report in the first instance.

The Ninth Circuit took a different view. The court held that an insurer must send an adverse-action notice in substantially broader and different circumstances—namely, "whenever a consumer pays a higher rate *because his credit rating is less than the top potential score.*" Pet. App. 118a (emphasis added). This "best rate" construction finds no support in the FCRA's text. The statute nowhere directs insurers to determine adverseness by comparing the use of a consumer's credit score to the use of a hypothetical "top potential score."

Under the Ninth Circuit's novel construction, the statute would counterintuitively require insurers to notify consumers that they were adversely affected by the use of their credit reports even if that use helped them, simply because it did not help them as much as use of a hypothetical "top" credit report would have. The Ninth Circuit's interpretation flies in the face of common sense. Congress could not have intended for insurers to misinform consumers receiving better insurance rates, by virtue of the insurers' use of the consumers' credit reports, that the consumers instead had been adversely affected by that use.

Recent congressional action confirms the Ninth Circuit's error. In 2003 Congress amended the FCRA to require creditors (but not insurers) to provide a separate "risk-based-pricing" notice to a consumer when the use of credit-report information results in an offer with "material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers." Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 311(a), 117 Stat. 1952, 1988 (codified at 15 U.S.C. § 1681m(h)(1)). This new provision specifies a baseline against which a creditor must measure the effect that use of credit-report information has had, and requires the creditor to provide a new type of notice to consumers when the creditor offers material terms that are below that baseline. Notably, the baseline is not the "best rate" available, as it is for the Ninth Circuit's interpretation of the adverse-action requirement. The 2003 amendment demonstrates that Congress knew how to link an FCRA notice requirement to the setting of a rate that is not as favorable as rates offered to other consumers. The FCRA's insurance-specific, adverse-action definition lacks any such language. The Ninth Circuit's construction would hold insurers to a higher standard than lenders, even though the only clear FCRA textual requirement for the provision of notices in this context is the risk-based pricing provision for lenders added by the 2003 FCRA amendments.

For the foregoing reasons, the Ninth Circuit's "best rate" construction is plainly erroneous. At a minimum, that construction was far from foreseeable, such that insurers' adoption of a contrary view could be termed "willful non-compliance" with the FCRA. Prior to the decision below, no court or binding agency regulation had construed the FCRA in the same way. The Ninth Circuit's determination that Petitioners could be subject to liability for statutory and punitive damages for not predicting the court's construction stretches § 1681n(a) far beyond the limited sphere envisioned by Congress.

3. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Determining That It Did Not Apply To Affiliates Who Neither Issue The Relevant Insurance Policy Nor Deny The Relevant Insurance Coverage

The Ninth Circuit also departed from the text and purpose of § 1681n(a) in concluding that certain insurance affiliate defendants—who neither issued, denied nor canceled the relevant insurance coverage—could have "willfully" violated the FCRA by not sending adverse-action notices.

There is no dispute that, if insurers act adversely on the basis of credit information, the FCRA requires that a notice of that adverse action to be sent to the affected consumer. But when a consumer submits an application to one of several affiliated entities, only the entity that issues the relevant insurance policy (and thus, for example, "charge[s]" a customer for insurance or "cancel[s]" that insurance) or the entity that "deni[es]" insurance coverage "takes" one of the "adverse actions" specified in § 1681a(k)(1)(B)(i). Only that entity is therefore required by the FCRA to send the consumer an adverse action notice. The Ninth Circuit erred in exposing additional insurer affiliates to liability if they do not send their own additional notices to the consumer or list themselves in a single, global notice. The court cast this unjustifiably wide net of liability by holding that any entity with any theoretical connection to an insurance rating decision "takes" an "adverse action" within the meaning of

§ 1681m(a), and therefore must provide an adverse-action notice to the affected consumer.

The Ninth Circuit's conclusion was based primarily on an incorrect piecing together of disparate statutory sections. The court emphasized two phrases: "any person" in § 1681m(a), and "in connection with the underwriting of insurance" in § 1681a(k)(1)(B)(i). The Ninth Circuit apparently believed that these phrases, if read together, reveal congressional intent to require any person with any theoretical connection to the purported adverse action to issue an adverse-action notice. *See* Pet. App. 122a. The terms are found in different statutory provisions, however, and there is no indication that Congress intended the meaning the Ninth Circuit adopted.

The Ninth Circuit also purported to ground its construction in the FCRA's purposes, but its ruling would disserve those very purposes. A single notice, provided by any single entity, is sufficient to alert a consumer that consideration of her credit report contributed to an adverse action. Requiring every insurance entity with any theoretical connection to the purported adverse action to issue additional notices, or requiring every such additional entity to be listed in a single notice, does nothing to enhance the consumer's understanding. In fact, such a requirement is likely only to confuse. Under the Ninth Circuit's holding, consumers must receive multiple notices from numerous insurance entities (or a single notice listing numerous such entities) with whom they have never had any interaction. Faced with flurries of such notices, many consumers likely would ignore them altogether. *See The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. On Banking, Housing, and Urban Affairs*, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) ("notices [given] too widely and in too many circumstances" can become "something that people ignore"). Such an outcome would be contrary to the FCRA's objectives.

Ultimately, the Ninth Circuit grounded its interpretation in reasoning that resembles the type of rulemaking that is not properly the province of an Article III court. Yet, as a court deciding a case or controversy, the Ninth Circuit did not provide interested parties the notice or opportunity for comment that would have accompanied a true administrative rulemaking. The court based its expansion of the adverse-action requirement on its conjecture that consumers probably do not "understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure." Pet. App. 124a. The court then asserted—without reference to statutory text, structure or legislative history—that Congress intended the FCRA to remedy this assumed lack of knowledge "[b]y imposing joint and several liability" on all insurance entities tangentially related to an insurance rating decision. *Id.*; *see id.* ("By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy."). From that speculative re-creation of congressional intent, the Ninth Circuit then fashioned from whole cloth new obligations that no court or agency had ever imposed.

The Ninth Circuit's novel interpretation was neither obvious nor correct. For this reason, the court's further holding that Petitioners' failure to predict the construction could support an award of statutory and punitive damages stretches the § 1681n(a) "willful noncompliance" provision beyond its intended coverage. Absent any judicial decision or binding agency regulations, Petitioners read the statute precisely as the first federal court to take up this issue did—the district court's decision in these cases. *See Razilov*, 242 F. Supp. 2d at 991.

4. Petitioners Could Not Have Willfully Violated The Adverse-Action Requirement By Sending Notices Satisfying The FCRA's Text, But Not The "Minimum" Requirements In The Ninth Circuit's Decision

The Ninth Circuit's final error is apparent in its finding that Petitioners could have "willfully" violated the FCRA by sending adverse-action notices that, in retrospect, did not accord with the court of appeals' newly announced "minimum" requirements for the content of such notices.

The Ninth Circuit acknowledged that the FCRA does not define the term "notice of an adverse action." Pet. App. 121a. The court nonetheless created its own rules—without urging by any party or amici, and without the benefit of briefing—respecting the information that must be included in such an adverse-action notice. *See id.* Significantly, the Ninth Circuit relegated the requirements that Congress and the Federal Trade Commission prescribed to a footnote, and supplemented the statutory language with additional requirements that the court deemed important. *See id.* & n.13. Thus, based on little more than its own conceptions of good policy, the court held that an adverse-action notice must "at a minimum," (1) "describe the action," (2) "specify the effect of the action upon the consumer," and (3) "identify the party or parties taking the action, and their respective roles." Pet. App. 121a.

No prior notice of these "minimum" requirements existed in either judicial precedent construing the adverse-action requirement or binding agency interpretations. In fact, most insurers could not have complied with the first and third requirements because, prior to the court of appeals' decision, it had not been contemplated that an insurer takes an "adverse action" in the "best rate" circumstances identified by the Ninth Circuit or that insurance affiliates that neither issue an insurance policy, cancel an insurance policy, nor deny coverage could be deemed to "take" an "adverse action."

* * *

The Ninth Circuit's application of the "recklessness" construction of § 1681n(a) in each of the four instances described above persuasively demonstrates why that construction should be rejected in favor of the view taken by the majority of the courts of appeals. By construing the term "willfully" to cover conduct that—for the reasons explained above—does not even qualify as "negligent," the Ninth Circuit's construction turns Congress's intent on its head. AIA respectfully submits that the Court should hold that one "willfully" violates the FCRA not through "recklessness," but only by knowingly and intentionally committing an act in conscious disregard for known legal rights of a consumer. Under that standard, it is indisputably clear that Petitioners cannot be subject to liability under § 1681n(a).

II. THE NINTH CIRCUIT'S HOLDING WOULD HAVE A SUBSTANTIAL, DAMAGING IMPACT ON THE INSURANCE INDUSTRY

The issues the Ninth Circuit addressed have substantial importance not just to the parties, but to all of the insurance industry, many of whose members interpreted the Act much as Petitioners did. The conclusions in the decision below expose insurers to statutory damages in situations that Congress did not intend, and to punitive damages even when they have sought in good faith to comply with the FCRA, including by seeking counsel's advice. This exposure threatens significant liability, with broad ramifications for the industry's ability to perform its important functions. Amicus estimates that since the beginning of 2001, more than 150 million new personal lines insurance policies have been written. Conservatively estimating that adverse-action violations might be found for half of those policies under the Ninth Circuit's incorrect constructions of the Act, the potential liability is staggering—particularly since the FCRA, unlike the Truth In Lending Act, does not impose a cap on total statutory damages available in class-action litigation. *Compare* 15 U.S.C. § 1681o(a)(1), *with id.* § 1640(a)(2)(B). Significantly, the Ninth Circuit decision sets the stage for these astronomical statutory damage awards, and for puni-

tive damage awards, in cases where consumers do not even allege that they suffered any actual damages. The decision below threatens to have a substantial and real impact on the operations of AIA's members. By removing enormous amounts of capital from the insurance system, such awards would inevitably harm the insurance marketplace.

In addition, the Ninth Circuit's decision has ramifications that extend beyond the specific issues addressed below. The FCRA intersects with the business of insurance in numerous ways. *See, e.g.*, 15 U.S.C. §§ 1681a(*l*), 1681b(a)(3)(C), 1681c(b), 1681m(d). If the Ninth Circuit's "reckless disregard" standard remains the law, insurers will face the prospect of severe class-action liability whenever a court might later decide (in hindsight) that insurers' answers to unsettled FCRA questions were "implausible." The nature of the FCRA is such that any single interpretation of an FCRA requirement frequently affects millions of transactions yearly. If a court later decides that adherence to such an interpretation was reckless, statutory damages of $100 to $1000 might be available for each of the millions of affected consumers, as well as punitive damages, resulting in potentially enormous liability. That result frustrates the very purposes the FCRA was designed to further. This effect is compounded by the Ninth Circuit's creation of an entirely novel standard for adjudicating a party's "willfulness" based on terms like "untenable," "creative," "implausible," and "indefensible." Those words carry no established meaning in other legal contexts, and only the Ninth Circuit knows their intended meaning here. The result is an unknown, unknowable standard that provides regulated parties no useful guidance.

CONCLUSION

The Court should reverse the judgments below and hold that, as a matter of law, Petitioners did not, and could not have, willfully violated the FCRA adverse-action requirement.

Respectfully submitted.

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NOVEMBER 2006

6330

Nos. 06-84 & 06-100

In The Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR,

Respondent.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] *amicus curiae*, the Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioners Safeco Insurance Company of America, *et al.* and GEICO General Insurance Company, *et al.*

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 500 consumer credit and other specialized consumer reporting agencies operating in the United States and throughout the world.

In its more than ninety-year existence, CDIA has worked with the United States Congress and various state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer-related information, including credit reports. In this role, CDIA was a key participant in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments, including the 2003 amendments under the Fair and Accurate Credit Transactions Act. CDIA has also published, maintained and updated a manual entitled *How to Comply with the Fair Credit Reporting Act*, which is used by its members and their clients.

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[1] No counsel for a party authored any part of this brief. No person or entity, other than CDIA, made any monetary contribution to the preparation or submission of this brief. Letters memorializing the consent of all parties to the filing of *amicus* briefs are on file with the Clerk of the Court.

CDIA is vitally interested in the outcome of this case because the court of appeals' misstatement of the "willfulness" standard subjects CDIA's members, and the members' clients, to unforeseen, staggering liability. In addition, the court of appeals' error in defining "adverse action" in the insurance context subjects CDIA's members and their clients to exponentially increased administrative costs in preparing to respond to consumer inquiries that will result if the "adverse action" notice provisions apply to millions of consumers who were not subject to any negative action because of consumer report information.

Because CDIA has been involved in the consumer reporting industry for more than ninety years, representing a variety of consumer reporting entities, CDIA believes that its experience provides a unique perspective on the issues presented that will aid the Court in its decision.

THE CONSUMER REPORTING INDUSTRY

In enacting the FCRA, the U.S. Congress recognized that the efficient functioning of the consumer reporting industry was vital to the U.S. economy.[2] Today, billions of items of consumer data are voluntarily furnished to consumer reporting agencies each month by 30,000 data furnishers, resulting in the creation and maintenance of files on nearly 200 million consumers, with more than 1.5 billion consumer reports issued annually.[3]

Because consumer reports are compiled over the course of years, based on information obtained from different types of furnishers, and updated on a periodic, sometimes daily, basis; insurers, creditors, landlords and employers can obtain a far more detailed picture of the

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[2] 15 U.S.C. § 1681(a)(1); *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

[3] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9 (hereinafter "*FTC Accuracy Report to Congress*"), http://www.ftc.gov/reports/facta/041209factarpt.pdf.

risk presented by a particular consumer. The availability of such information allows users of consumer reports to make fast, reliable decisions about a prospective applicant.[4] By making reliable data available to insurers, creditors, employers, landlords, law enforcement and counter-terrorist agencies, consumer reporting agencies provide the information infrastructure that contributes to the soundness, safety and efficiency of employment, housing, insurance, banking, finance, retail credit and law enforcement systems in the United States.

The availability of consumer report information enables the consumer spending that accounts for over two-thirds of U.S. gross domestic product.[5] U.S. consumers have greater and more rapid access to credit, at a lower cost, than any other consumers in the world.[6] Moreover, the availability of standardized, reliable consumer report information makes it possible for creditors to bundle consumer credit portfolios and sell them to investors. A recent study concluded that U.S. mortgage rates are a full two percentage points lower than those in Europe because creditors are able to securitize and sell their mortgage loan portfolios.[7] As a result, U.S. consumers save as much as $100 billion each year due to the efficiency and liquidity made possible by the consumer reporting industry.[8]

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[4] Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation*, at vi (May 2003), http://www.ftc.gov/bcp/workshops/infoflows/statements/cate02.pdf (hereinafter "Staten and Cate, *The Impact of National Credit Reporting*"); *Id.*

[5] Staten and Cate, *The Impact of National Credit Reporting* at ii.

[6] *See* Walter F. Kitchenman, *U.S. Credit Reporting: Perceived Benefits Outweigh Privacy Concerns*, The Tower Group, at 5 (Jan. 1999) (hereinafter "Kitchenman, *U.S. Credit Reporting*").

[7] Kitchenman, *U.S. Credit Reporting*, at 7.

[8] Staten and Cate, *The Impact of National Credit Reporting* at 7; *see also*, Fred H. Cate and Richard J. Varn, *The Public Record: Information Privacy and Access - A New Framework for Finding the Balance*, at 11 (1999) http://it.ojp.gov/initiatives/files/Public_Record.pdf.

Credit scores and insurance scores are often provided to creditors and insurers, either as part of a more detailed consumer report or alone to assist the creditor or insurer in making risk determinations. Credit scores are based on an analysis of several factors including the consumer's payment history; the amount owed by the consumer; the length of the consumer's credit history; the consumer's recent applications for credit as well as other factors.[9] Insurance scores are developed using similar consumer report information. Credit scores predict the likelihood of credit default; insurance scores predict the likelihood that an insured will make a claim for a covered event during the policy period.[10]

The U.S. consumer reporting system evolved and operates on a purely voluntary basis. There is no legal requirement that any entity furnish information to a consumer reporting agency. If the providers of consumer reports and the furnishers of consumer report information must face company-crippling liability for the good-faith compliance decisions they make on a daily basis, there will be little incentive to participate in the consumer reporting process. If consumer reports become less complete and, consequently, less accurate, they will be less predictive. The result will be increased transaction costs whenever a creditor or insurer makes a risk determination, and thus increased costs to the consumer. Such an outcome would effectively undo the thirty-five years of progress in the consumer credit and insurance industries since the 1970 enactment of the FCRA.

SUMMARY OF ARGUMENT

This Court should reverse the court of appeals' decision to correct a fundamental misstatement of the law that

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[9] *See,* MyFICO, *What's In Your Score?*, http://www.myfico.com/CreditEducation/WhatsInYourScore.aspx; Vantagescore.com at http://www.vantagescore.com/consumerinfo.html.

[10] *Id.* at 1.

will subject consumer reporting agencies, users of consumer report information, and furnishers of information to virtually unlimited liability for their compliance decisions, most notably when struggling with novel interpretive issues arising from the FCRA's often ambiguous statutory language.

The FCRA is a complex statute, based on unique definitions, creating an intricate framework for regulating all aspects of consumer reporting. Select FCRA requirements are implemented by rules promulgated by the Federal Trade Commission ("FTC"), the federal banking agencies and the National Credit Union Administration ("NCUA").[11] However, for most FCRA provisions, there has been no rulemaking, leaving consumer reporting agencies, users of consumer reports and furnishers of consumer report information to interpret ambiguous language without definitive, authoritative guidance from any agency or court.

Consumer reporting agencies and users and furnishers of consumer report information are subject to civil liability, including statutory damages of up to $1,000 and punitive damages if they "willfully fail[] to comply with any requirement" imposed by the FCRA.[12] Because the FCRA does not limit damages in class actions, the potential liability is limited only by the number of consumers (200 million) on whom consumer reporting agencies maintain file information. The potential liability is, literally, in the hundreds of billions of dollars, often for alleged violations where there are no actual damages. This exposure coupled with the uncertainty regarding the legal obligations imposed by the Act create an environment

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[11] 15 U.S.C. § 1681a(s) (defining "Federal banking agency" by reference to section 3 of the Federal Deposit Insurance Act); *See*, 12 U.S.C. § 1813(z) ("The term 'Federal banking agency' means the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation.").

[12] 15 U.S.C. § 1681n(a).

where consumer reporting agencies, users and furnishers are frequently required to defend frivolous claims where there has been no willful violation.

The court of appeals' decision effectively eliminates one of the principal defenses available to any consumer reporting agency or user or furnisher of consumer report information when the law is unsettled but the company has made a good-faith effort to comply. Under the court of appeals' novel willfulness standard, a company can be held liable for willfully violating the Act when:

> (i) The compliance issue is one of first impression;
>
> (ii) The statutory provision creating the compliance obligation is ambiguous;
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> (iii) The company obtains and follows the advice of counsel in developing its compliance approach; and
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> (iv) The district court holds, as a matter of law, that the interpretation adopted and followed by the company complies with the FCRA.

The court of appeals incorrectly held that, in order to establish a willful violation under the FCRA, the plaintiff need not show that the defendant *knew* that its actions violated any statutory obligation or requirement, but only that its compliance solution was implausible, untenable or the result of creative lawyering.[13] As demonstrated in the very case before this Court, such slippery standards lead to results that cannot and should not be sustained. The court of appeals itself, in attempting to apply its willfulness standard, issued two prior opinions,[14] twice errantly holding as a matter of law that all of the defendants willfully violated the FCRA, before withdrawing those

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[13] *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006).

[14] *See, Reynolds v. Hartford Financial Services Group, Inc.*, 426 F.3d 1020 (9th Cir. 2005); *Reynolds v. Hartford Financial Services Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005).

opinions and issuing the opinion now before the Court.[15] Although the court of appeals ultimately withdrew its liability determination, its willfulness standard remained; that standard cannot be applied in a manner that comports with the language of the FCRA or the expressed intent of Congress.

If uncorrected, the court of appeals' decision leaves consumer reporting agencies, users of consumer report information, and furnishers of consumer report information to negotiate the FCRA's numerous compliance obstacles with the guillotine of willfulness poised to drop if a reviewing court determines that a particular decision, even in a case of first impression, is sufficiently "creative" or "unreasonable" that it rises to the level of "implausibility."

Finally, the court of appeals incorrectly interpreted the substantive adverse action notice requirement in a manner that is inconsistent with the language of the statute and that imposes compliance burdens upon consumer reporting agencies, users of consumer reports, and furnishers of consumer report information that could not have been intended by Congress.

ARGUMENT

I. THE COURT OF APPEALS' DECISION THREATENS THE CONSUMER REPORTING INDUSTRY WITH UNLIMITED LIABILITY.

The court of appeals held that:

> [A]s used in the FCRA, "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers

[15] In its original opinion, the majority found "[b]ecause the district judge has already ruled that the companies' positions on all of the principal issues were correct as a matter of law, she has also held, *a fortiori*, that the companies' positions were not unreasonable." *Reynolds*, 416 F.3d at 116 n.18.

> pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights."[16]

The court of appeals then explained that, in its view, "conscious disregard" can mean arriving at an "implausible" compliance determination or a determination that is the result of "creative lawyering."[17] In doing so, the court of appeals merged the FCRA's negligent liability standard with the willfulness liability standard. That is, according to the court, "[w]hether or not there is a willful disregard in a particular case may depend in part on the obviousness or *unreasonableness* of the erroneous interpretation."[18]

Civil liability for the negligent failure to comply with the FCRA is expressly limited to the recovery of actual damages and attorneys' fees.[19] The court of appeals' decision ignores this limitation. In the court of appeals' view, *unreasonable* compliance decisions can provide the basis for a claim that the FCRA has been willfully violated, thereby subjecting a defendant to statutory damages of up to $1,000 per violation; damages that are unlimited in the class action context, as well as punitive damages.

Consumer reporting agencies are sued literally hundreds of times each year.[20] Because of the availability of statutory damages without any need to establish actual harm, virtually all of these complaints allege that the consumer reporting agencies *willfully* violated the FCRA. Left uncorrected, the court of appeals' decision subjects consumer reporting agencies to potentially billions of dollars of liability for FCRA compliance determinations that are, at worst, *negligent* (*i.e.*, unreasonable) even when

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[16] *Id.* (citations omitted).

[17] *Reynolds*, 435 F.3d at 1099.

[18] *Id.* (emphasis added).

[19] 15 U.S.C. § 1681o.

[20] The number of lawsuits filed against consumer reporting agencies arise from fewer than 1/100,000th of the 1.5 billion consumer reports produced annually.

the compliance decision is endorsed by a U.S. District Court. For consumer reporting agencies, the result will be increased costs to account for the ever-present risk of staggering liability when making their compliance determinations, costs that will ultimately be borne by consumers.

A. The FCRA is a complex, often unclear, statutory regime.

The FCRA governs all aspects of consumer reporting. The FCRA contains 31 separate sections, 145 subsections, and approximately 34,000 words. Portions of the FCRA have been explained in an FTC Commentary that is now more than sixteen years old and which does not address any of the amendments added to the FCRA in 1996 or 2003.[21] The FTC staff has issued more than 100 staff attorney opinion letters attempting to explain various compliance obligations.[22] The 2003 amendments alone have been the subject of more than sixteen separate rulemakings by six different federal agencies, with more rulemaking scheduled.[23]

Since the 2003 amendments, some agencies have even failed to meet their statutory rulemaking deadlines. For example, when Congress amended the FCRA, it added a new notice requirement, applicable only to creditors.[24] The amendment creating the obligation required the FRB and the FTC to jointly issue implementing rules by December

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[21] 16 C.F.R. Pt. 600, App.

[22] *See*, http://www.ftc.gov/os/statutes/fcra/index.html.

[23] The Federal banking agencies are required to promulgate regulations "as necessary to carry out the purposes of the" FCRA. *See*, 15 U.S.C. § 1681s(e). In addition, in limited circumstances, the FTC and NCUA are also authorized to promulgate regulations implementing select portions of the FCRA. *See, e.g.*, 15 U.S.C. § 1681e(d)(2); 15 U.S.C. § 1681g(c)(3); 15 U.S.C. § 1681j(f)(2); *see also*, 15 U.S.C. § 1681b(g)(5); 15 U.S.C. § 1681c(h)(2)(A); 15 U.S.C. § 1681m(e)(1).

[24] 15 U.S.C. § 1681m(h).

1, 2004.[25] To date, almost two years after the initial rulemaking deadline, the rules have yet to be promulgated, or even proposed. When the rulemaking process is complete, creditors will be required to provide notice to consumers if the use of a credit report results in treatment that is less favorable than that received by other consumers. The subsection adding this risk-based pricing notice obligation contains language such as "material terms," "materially less favorable," "most favorable terms," and "substantial proportion of consumers."[26] The agencies' continued delay in rulemaking is just one of many indications of the FCRA's complexity and the inability of the federal agencies to define or explain many of the FCRA's terms.

In rulemaking under the FCRA, the agencies have defined, in detail, seemingly common terms such as "company,"[27] "consumer,"[28] "dispose,"[29] "disposing,"[30] "disposal,"[31] "file disclosure,"[32] "identifying information,"[33] "medical information,"[34] and "simple and easy to understand."[35] For other provisions, the agencies have remained silent. In the absence of guidance, consumer reporting agencies and users and furnishers of consumer report information must attempt to discern their obligations from the uncertain language of the FCRA, the smattering of

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[25] 15 U.S.C. § 1681m(h)(6).

[26] 15 U.S.C. § 1681m(h)(1).

[27] 12 C.F.R. § 41.3(d); 12 C.F.R. § 222.3(d); 12 C.F.R. § 334.3(d); 12 C.F.R. § 571.3(d); 12 C.F.R. § 717.3(d).

[28] 12 C.F.R. § 41.3(e); 12 C.F.R. § 222.3(e); 12 C.F.R. § 334.3(e); 12 C.F.R. § 571.3(e); 12 C.F.R. § 717.3(e).

[29] 16 C.F.R. § 682.1(c).

[30] *Id.*

[31] *Id.*

[32] 16 C.F.R. § 610.1(b)(7).

[33] 16 C.F.R. § 603.2(b).

[34] 12 C.F.R. § 41.3(k); 12 C.F.R. § 222.3(k); 12 C.F.R. § 232.1(c)(5); 12 C.F.R. § 334.3(k); 12 C.F.R. § 571.3(k); 12 C.F.R. § 717.3(k).

[35] 15 U.S.C. § 1681m(d)(2)(B); 16 C.F.R. § 642.2(a).

case law and a patchwork of informal agency pronouncements to the extent that they are helpful.

B. The FCRA includes terms that often have inconsistent or contradictory definitions or no definitions at all.

In the FCRA, even seemingly simple terms are not simply defined. Not only are the definitions often internally inconsistent, but courts interpreting the definitions often do so in a manner that imposes obligations upon consumer reporting agencies, users of consumer reports and furnishers of consumer report information that are not found in the language of the FCRA itself. Under the court of appeals' willfulness standard, misinterpreting such terms can result in unlimited liability.

For example, the term "firm offer of credit or insurance" is defined to mean "any offer of credit or insurance that will be honored. . . . "[36] The definition is then qualified. The offer, it turns out, is not so "firm" and it need not always be "honored."[37] Moreover, although the statutory language does not indicate that the offered credit must be of any particular value, the term "firm offer of credit" was interpreted by the Seventh Circuit Court of Appeals in November 2004 to require that the offer have "sufficient value."[38] The "sufficient value" standard is found nowhere in the FCRA or in any implementing rule and was not part of the firm offer of credit definition when the definition was added to the FCRA or when the Seventh Circuit rendered its decision. Nonetheless, following the decision, more than 250 putative class actions were filed against users of consumer report information alleging willful violations of the FCRA for having failed to make a firm

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[36] 15 U.S.C. § 1681a(l).

[37] 15 U.S.C. § 1681a(l); *see also, Kennedy v. Chase Manhattan Bank, USA, N.A.*, 369 F.3d 833, 840 (5th Cir. 2004) (explaining the additional conditions that may apply to a firm offer of credit).

[38] *Cole v. U.S. Capital*, 389 F.3d 719, 726 (7th Cir. 2004).

offer of credit of sufficient value. Now, in addition to the statutory definition, CDIA's members' clients, the users of consumer report information, must read into the definition of "firm offer of credit" a "sufficient value" concept found nowhere in the statute. If the firm offer of credit will not be of sufficient value, the user does not have a permissible purpose to obtain the consumer report and the consumer reporting agency may not furnish the consumer report to the user. The absence of a permissible purpose can give rise to a class action claim that the FCRA was willfully violated.

The "adverse action" definition, which is the subject of the appeal before this Court, also presents numerous inconsistencies and opportunities for misinterpretation. Adverse action means something different in the credit context than it means in the insurance or employment contexts.[39] In a credit transaction, a consumer report user would not take adverse action by failing to provide credit at an interest rate that was equal to the rate it would charge a hypothetical consumer with the top potential credit score.[40] In the insurance context, at least according to the court of appeals, the failure to offer insurance to a consumer at a premium rate equal to that which would be offered to a consumer with the top potential insurance score is adverse action.

Other provisions impose compliance obligations using terms that are undefined. For example, the FCRA requires that furnishers of consumer report information provide

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[39] In the credit context, the FCRA defines "adverse action" by incorporating the definition found in the Equal Credit Opportunity Act. 15 U.S.C. § 1681a(k)(1)(A). Adverse action in the credit context does not, however, include a counteroffer by a creditor that the consumer accepts. 12 C.F.R. § 202.2(c). In the employment context, "adverse action" means "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee. . . ." 15 U.S.C. § 1681a(k)(1)(B)(ii).

[40] *See*, 15 U.S.C. § 1681a(k)(1)(A); 15 U.S.C. § 1691(d)(6); 12 C.F.R. § 202.2(c)(1).

"accurate" information to consumer reporting agencies.[41] The FCRA also requires that consumer reporting agencies maintain "reasonable procedures" to assure "maximum possible accuracy"[42] when preparing a consumer report and imposes upon furnishers the obligation to investigate when a consumer disputes the "completeness" or "accuracy" of consumer report information.[43] The FCRA fails to define any of these critical terms, leaving consumer reporting agencies and furnishers to reach their own conclusions about the meaning of terms that are anything but clear. According to the FTC, "accuracy is a complex issue and presents challenges in defining and identifying errors."[44]

In the 2003 amendments to the FCRA, Congress required the FTC to study the accuracy and completeness of consumer reports and report to Congress.[45] In responding, the FTC reasoned that it must first study the "feasibility of a methodology" that will be used to assess accuracy and completeness.[46] In effect, although the accuracy and completeness requirements had been part of the FCRA for more than twenty-three years, as of 2004, the FTC did not know how to measure compliance with the requirement. Given the complexity of the credit reporting process under the FCRA, this was no surprise to the consumer reporting agencies who had struggled with this obligation for years.

Similarly, the meaning of "complete" for consumer reporting purposes remains unclear. As the FTC has

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[41] 15 U.S.C. § 1681s-2(a)(1)(A).

[42] 15 U.S.C. § 1681e(b).

[43] 15 U.S.C. § 1681s-2(b)(1)(D)-(E).

[44] *FTC Accuracy Report to Congress* at 22.

[45] *Id.*; *see also*, Federal Trade Commission, *Notice of Roundtable To Aid Federal Trade Commission Staff in Conducting a Study of the Accuracy and Completeness of Consumer Reports, Pursuant to Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, 69 Fed. Reg. 32549, 32550 (Jun. 10, 2004).

[46] *FTC Accuracy Report to Congress* at 32.

recognized, the FCRA itself and its amending legislation do not even agree on the meaning of "completeness."[47] A consumer may believe that a consumer report is "incomplete" because account information is not reported for every account the consumer has opened. The FCRA does not require any creditor or insurer to provide transaction and experience information to any consumer reporting agency. Because the consumer reporting system is voluntary,[48] it is possible that not all of the consumer's account information will be reflected in a consumer report.[49] For a consumer with a good payment history on a particular account, the absence of that information – *i.e.*, the report's incompleteness – may result in the consumer having a lower credit score. For a consumer who has missed a number of payments, the absence of this information will benefit the consumer and may result in the consumer having a higher credit score than would otherwise be the case if the report were complete. In both instances, the report is arguably "incomplete" because it does not contain all of the information regarding the consumer's credit history for every account the consumer has opened. The report, however, would be "complete" for FCRA purposes because the missing information was never reported to the consumer reporting agency.

Reflecting the difficulty in defining accuracy and completeness, courts have applied different tests to determine whether consumer report information is accurate or

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[47] *FTC Accuracy Report to Congress* at 5 n. 10.

[48] *See, Interagency Advance Notice of Proposed Rulemaking to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act*, 71 Fed. Reg. 14419, 14421 ("Most of the information that consumer reporting agencies collect and maintain is provided voluntarily by furnishers.").

[49] Some creditors do not furnish transaction and experience information at all while others only furnish such information to one or two of the nationwide consumer reporting agencies. *FTC Accuracy Report to Congress* at 12.

complete under the FCRA.[50] When courts have examined the issue under a standard of reasonableness, they have often applied a balancing test, pursuant to which the court weighs the potential that the information in a consumer report will create a misleading impression against the availability of more accurate or complete information and the burden of providing such information.[51] The consumer reporting agencies' obligation to follow reasonable procedures to assure the accuracy of consumer report information is appropriately examined under traditional tests for negligence.[52] Increasingly, however, plaintiffs allege that a consumer reporting agency's failure to follow reasonable procedures to assure accuracy constitutes a "willful" violation of the FCRA, not just a negligent violation.

If the court of appeals' decision is not reversed, other courts may conclude that a consumer reporting agency's negligence in preparing an "inaccurate" consumer report gives rise to a willful violation, even absent any actual damages. At the very least, the litigation risk would create serious disincentives for consumer reporting agencies to provide the robust consumer report information upon which the nation's economy has come to depend.

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[50] *Compare, e.g., Sepulvado v. CSC Credit Services, Inc.*, 158 F.3d 890, 896 (5th Cir. 1998), *cert. denied*, 526 U.S. 1044 (1999) (report is inaccurate when it is patently incorrect or misleading) *with Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, (D.C. Cir. 1984) (factual inaccuracy exists if information that is technically correct is misleading; and incomplete information is a type of inaccuracy distinct from misleading information); and *Dalton v. Capital Associated Industries*, 257 F.3d 409 (4th Cir. 2001) (reporting agency may be liable if a third party vendor reports information that is inaccurate because it is misleading).

[51] *Koropoulos*, 734 F.2d at 42; *Alexander v. Moore & Associates*, 553 F. Supp. 948 (D. Haw. 1982).

[52] *E.g., Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (D.C. Cir. 1984); *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98 (2d Cir. 1997).

C. The official guidance concerning FCRA compliance has been inconsistent, incomplete and, at times, rejected by the courts.

Because the FTC enforces the FCRA with respect to insurers and other users and furnishers of consumer report information, counsel for these companies have sought guidance from the FTC. They have obtained conflicting and often unhelpful advice. Courts that have considered the informal guidance provided by the FTC staff have sometimes rejected it as unpersuasive.[53] One district court, considering the FTC staff's opinion concerning the meaning of "increase" in the definition of adverse action for insurance purposes (one of the issues before this Court) rejected the FTC staff's views, in part, because the FTC's interpretation relied upon legislative history for previous proposed amendments to the definition of "adverse action" that were never enacted and that were substantially different from the enacted definition.[54]

The Federal banking agencies have also disagreed with the FTC's staff interpretation of the FCRA's provisions. For example, in July 2000, the FTC staff opined that a lender does not have a permissible purpose under the FCRA to obtain a consumer report on an individual who is the principal, owner, or officer of a commercial

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[53] *Scharpf v. AIG Marketing, Inc.*, 242 F. Supp. 2d 455, 465 (W.D.Ky. 2003) ("the [FTC] position should be followed to the extent persuasive." (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)). . . . however, the Court does not find the FTC's position to be persuasive."); *Milbauer v. TRW, Inc.*, 707 F.Supp. 92 (E.D.N.Y. 1989) ("the Court rejects the [Federal Trade] Commission's bright line approach to determine whether or not a consumer credit agency must respond to a consumer's inquiry.").

[54] *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1318 (D.Or. 2003) ("As a result, the Court concludes the legislative history relied on by [Plaintiff] does not indicate clearly that Congress meant something other than the plain meaning of the statutory language in § 1681a(k)(1) or that the Court's literal interpretation of that plain meaning is contrary to Congressional intent."), *abrogated by, Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006).

loan applicant.[55] In response to the staff attorney opinion letter, the Federal banking agencies wrote to the FTC,[56] expressing their belief:

> [T]hat a contrary view, as implied in the [FTC staff's] Tatelbaum Letter, raises concerns regarding safe and sound lending practices, operational efficiencies, and credit availability. Our interpretation of the FCRA, by contrast, would resolve those concerns in a manner that is fully consistent with the terms and purposes of the FCRA and that promotes prudent lending practices.[57]

Eleven months later, the FTC reversed itself, concluding that the FCRA permits a lender to obtain a consumer report in connection with a business credit transaction if the consumer will be personally liable.[58]

Given the court of appeals' willfulness standard, one must ask whether the court of appeals would have concluded, during the time between the two staff attorney opinion letters, or before the federal banking agencies objected, that a lender who obtained a consumer report on an individual who guaranteed a commercial loan had willfully violated the FCRA? If the lender relied on the advice of counsel to determine that it could obtain such a report, would the court of appeals have not only disagreed but concluded that the decision was unreasonable? These questions demonstrate the risk now faced by those who

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[55] FTC Staff Opinion Letter from David Medine to Charles Tatelbaum, p. 3-4, (Jul. 26, 2000).

[56] Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and Office of Thrift Supervision General Counsels' Letter to Federal Trade Commission, p. 2 (May 31, 2001), *available at* http://www.occ.treas.gov/ftp/advisory/2001-6a.pdf.

[57] *Id.*

[58] FTC Staff Opinion Letter from Joel Winston to Federal Banking Agency Counsels (Jun. 22, 2001).

must comply with the FCRA in the wake of the court of appeals' decision.

When attempting to comply with unclear provisions not explained in the FCRA's Commentary, case law, or other authoritative guidance, consumer reporting agencies and users and furnishers of consumer report information have often turned to the FTC for informal guidance in understanding their compliance obligations. In fact, one of the FTC's most senior staff attorneys responsible for FCRA enforcement recently testified in a pending case involving risk-based pricing that the FTC staff recognized that the insurance industry had a "difficult problem" drafting adverse action notices based on the FTC's informal interpretations, but that it was up to the "insurance lawyers to figure out what to do."[59]

The point here is not to highlight the FTC's change of position, or that courts have rejected its informal compliance determinations, or even to illustrate that the FTC has left those parties who seek its guidance to their own devices; but rather to demonstrate the complexity of the FCRA and the compliance challenges facing consumer reporting agencies and their clients.

D. The court of appeals' decision eliminates the protections provided by the FCRA's reasonableness standard.

The court of appeals' holding that "willfulness" can be established without conscious wrongdoing is inconsistent with the text and structure of the FCRA, the Act's balancing of the rights of consumers against the needs of the economy, and the legislative history of the Act.

Although the Act contains no express definition of the word "willful," the intended definition is illuminated by the other appearance of the word "willful" in the FCRA, in

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[59] Deposition of Clarke Brinckerhoff, *Ashby v. Farmers Insurance Company of Oregon et al.*, U.S. District Court for the District of Oregon, Case Number CV 01-1446 BR, Sept. 6, 2006, p. 91:3-91:16.

section 1681h(e). As this Court has repeatedly observed, "identical words used in different parts of the same act are intended to have the same meaning."[60] This maxim is especially applicable here, since section 1681h(e) makes explicit reference to section 1681n. Specifically, it provides that:

> Except as provided in sections ... [U.S.C. §§ 1681n and 1681o], no consumer may bring any action ... in the nature of defamation, invasion of privacy, or negligence against any consumer reporting agency, ... user ..., or any ... furnishe[r] ... except as to false information furnished *with malice or willful intent to injure* such consumer.[61]

The use of "willful" in § 1681h(e) is clearly inconsistent with the court of appeals' definition of willful as including mere recklessness. A "willful intent to injure" necessarily connotes *actual* intent, as it is impossible to see how a defendant may be in reckless disregard of its own "intent to injure."

Moreover, the court of appeals' watered-down standard of "willfulness" under which a legal judgment as to a "previously undecided question" can be a willful violation if it does not conform to "an answer ... [that] is objectively apparent,"[62] is dangerously inconsistent with the nature of the obligations set forth in the FCRA. The Act is designed to encourage consumer reporting agencies to make "reasonable" judgments that protect consumers without unduly limiting the flow of (or raising the price of) information that Congress understood to be critical to the proper functioning of American commerce. The court of appeals' willfulness standard, which threatens the

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[60] *IBP, Inc. v. Alvarez*, 546 U.S. 21, 23 (2005); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (applying the "normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning' ") (citations omitted).

[61] 15 U.S.C. § 1681h(e) (emphasis added).

[62] *Reynolds*, 435 F.3d 1099.

imposition of unlimited financial penalties based on standardless, *post hoc* determinations, upsets that balance by creating overwhelming incentives for consumer reporting agencies to err on the side of adopting procedures far more restrictive than what reasonableness would require.

Congress made a considered decision to avoid bright-line rules in many of the key provisions of the FCRA.[63] Instead it adopted a reasonableness-based approach designed to protect consumers while not unduly interfering with the important commercial purposes of credit reporting.[64] This approach cannot coexist with the imposition of punitive liability on the basis of a "willfulness" standard that does not require conscious wrongdoing. A reasonableness standard necessarily requires the exercise of judgment and discretion as to what the statute requires, and a jury or reviewing court, like the court of appeals in this case, may find even a good-faith interpretation of the requirements of the statute "implausible" and therefore (under the court of appeals' approach) potentially worthy of punishment. In particular, because reasonableness is often in the eye of the beholder, any consumer reporting agency that makes a decision that is not *maximally* protective of consumer rights necessarily "disregards" a risk that its actions will later be deemed "unreasonable"

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[63] *See, e.g.*, 15 U.S.C. § 1681(b); 15 U.S.C. § 1681e(a); 15 U.S.C. § 1681i(a)(1)(A); *see also*, 15 U.S.C. § 1681i(a)(5)(C); 15 U.S.C. § 1681s-2(a)(1)(A); 15 U.S.C. § 1681d(c); 15 U.S.C. § 1681m. Other provisions of the Act set forth obligations that depend on similarly generalized terms and/or require discretionary judgments. *E.g.*, 15 U.S.C. § 1681k(a)(2); 15 U.S.C. § 1681i(a)(5).

[64] The legislative history confirms that Congress sought to craft a regulatory regime that can "prevent consumers from being unjustly damaged by inaccurate credit reports" while avoiding "undue burdens on legitimate credit bureaus" that play a "vital role" in the nation's economy. *See* 115 Cong. Rec. 33412 (Nov. 6, 1969) (statement of Sen. Williams); *see also* 115 Cong. Rec. 33410 (Nov. 6, 1969) (statement of Sen. Proxmire) (observing that "I think we have a bill that will work . . . for the consumer and will protect the very important interests of a vital industry.").

and therefore "in contravention of the rights possessed by consumers pursuant to the FCRA."[65]

Under the court of appeals' approach, the only thing protecting such a consumer reporting agency from potentially unlimited punitive liability is the hope that a jury will later find that its disregard of that risk was not "reckless." The flimsiness of such protection necessarily imposes tremendous pressure on consumer reporting agencies to flee from the "reasonableness" standard Congress intended toward the most consumer-protective approach without regard to the effects on commerce or the increased costs passed on to all consumers.

These concerns about potential liability, moreover, are by no means hypothetical. The volume of FCRA litigation is large. There is an organized plaintiffs' bar and consumer reporting agencies, users and furnishers of consumer report information are sued hundreds of times each year, including in numerous class actions. Because consumer reporting agencies generate over 1.5 billion consumer reports per year relating to 200 million consumers, even a relatively minor or technical violation can expose consumer reporting agencies to crushing liability.[66] By removing the requirement that plaintiffs produce objective proof of conscious wrongdoing, the court of appeals' standard dramatically expands the potential liability of consumer reporting agencies, users and furnishers of consumer report information and increases the costs of defense for any case in which willfulness is alleged and class certification is sought.

This Court should reverse the court of appeals' decision and make clear that any finding of willfulness in the context of a claimed FCRA violation requires a showing

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[65] *Reynolds*, 435 F.3d at 1098.

[66] *See, e.g., Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J. dissenting from denial of certiorari) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion.").

that the consumer reporting agency, user or furnisher engaged in conscious wrongdoing and did not simply reach an incorrect and unreasonable conclusion as to the interpretation to be given to a not-yet-judicially-construed statutory obligation.

II. THE COURT OF APPEALS' INTERPRETATION OF "ADVERSE ACTION" WILL IMPOSE EXTRAORDINARY BURDENS UPON CONSUMER REPORTING AGENCIES THAT CONGRESS DID NOT INTEND.

The court of appeals held that any consumer who, based in whole or in part on consumer report information, does not receive the insurance premium rate that would be charged to a hypothetical consumer with the top potential insurance score has suffered adverse action.[67] The court's decision improperly defines "adverse action" in the insurance context in a manner that fails to achieve the policy objectives purportedly underlying the court's decision, and imposes enormous, counterproductive compliance burdens upon consumer reporting agencies, consumer report users and furnishers of consumer report information.

The court based its interpretation of "adverse action" on its belief that it "best comports with the stated purpose of the FCRA: to ensure the '[a]ccuracy and fairness' of credit reporting."[68] The court believed that its decision advanced this purpose by: (i) allowing consumers to check the accuracy of their consumer report information; and (ii) even when the information is accurate, giving consumers important information about the benefits of improving their credit report information.[69] The court's speculative basis for its decision does not comport with the manner in which insurers use insurance scores in setting premiums. As a result, the court's policy reasons for its interpretation

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[67] *Reynolds*, 435 F.3d at 1092.

[68] *Id.*

[69] *Id.*

are invalid and are inconsistent with the real effect on consumers.

Because insurance scores are very accurate predictors of loss, they are widely used in insurance underwriting.[70] As a result, insurers are able to offer as many as 70% of their customers lower premiums.[71] Thus, for the vast majority of consumers, the charge for insurance is *decreased* from the premium that the insurer would have charged without the use of insurance scores. However, very few consumers are charged the lowest possible insurance premium when an insurance company bases the premium in whole or in part on consumer report information including an insurance score.[72] Because these scores are comprised of many different factors, even a consumer with an unblemished credit history can have an insurance score that is less than the top potential score. For example, a consumer may have no delinquent payments in his credit history, but because payment history accounts for only one-third of the score; other factors such as the amount of outstanding credit or the length of the consumer's credit history may cause the consumer to have a reduced insurance score.[73] In this way, a consumer report

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[70] Insurance Information Institute, *The Use of Credit Information in Personal Lines of Insurance Underwriting*, p. 3 (June 2004), *available at*, http://www.iii.org/media/hottopics/insurance/creditscoring/credit_paper/.

[71] Frank M. Fitzgerald, Commissioner Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance* at 7 (2002), *available at* http://www.michigan.gov/documents/cis_ofis_credit_scoring_report_52885_7.pdf; National Association of Independent Insurers, *Statement to the Commissioner of Financial and Insurance Services Regarding the Use of Credit Information by Personal Lines Insurers*, p. 4 (June 16, 2002), *available at* http://www.michigan.gov/documents/cis_ofis_naii_statement_31885_7.pdf.

[72] *The Use of Credit Information in Personal Lines of Insurance Underwriting*, at 10 (only 11% of consumers have a FICO credit score of 800 or higher).

[73] Consumer Federation of America and Fair Isaac Corporation, *Your Credit Scores*, at 2 (2005), http://www.myfico.com/Downloads/Files/myFICO_CFA%20pamphlet.pdf; Vantage Score Solutions, LLC,

(Continued on following page)

that is accurate and complete, with no derogatory information, may cause a consumer to pay an insurance premium that is higher than the lowest premium available to a consumer with the top potential score. Because most consumers do not have the top potential score, according to the court of appeals' interpretation, the vast majority of insurance company customers suffer adverse action when they apply for insurance or renew an existing insurance policy, even when their insurance score actually reduces the premium they would otherwise be charged.[74] For consumer reporting agencies, such an outcome is not a mere academic exercise.

Millions of consumers obtain insurance from, or renew insurance with, insurers who use insurance scores to set initial premiums, or renew existing policies.[75] As a result of the court of appeals' decision, almost everyone who applies for insurance, or renews an existing policy, will receive an adverse action notice because they will be charged more than the lowest possible premium rate charged to those consumers with the top potential insurance score even when their credit or insurance score resulted in a lower premium. If uncorrected, the court of appeals' decision will result in the sending of tens of millions of adverse action notices each year to consumers who will be told they are the subjects of adverse action but whose consumer report information was accurate and contained no derogatory information.[76]

Consumer Information (2006), http://www.vantagescore.com/consumerinfo.html.

[74] *Reynolds*, 435 F.3d at 1092.

[75] *The Use of Credit Information in Personal Lines of Insurance Underwriting*, at 3 ("Because it has been shown to be such an accurate predictor of loss, some 90 percent of insurers use credit data in new business underwriting.").

[76] According to Fair Isaac, only 13% of the population has a credit score of 800 or higher on the FICO score range of 300 to 850. *MyFICO, Understanding Your Credit Score*, p. 7 (July 2005), available at http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf. If

(Continued on following page)

For consumer reporting agencies and furnishers of consumer report information, the provision of these millions of additional adverse action notices means exponentially higher administrative costs to respond to consumer inquiries and disputes. Every consumer who receives an adverse action notice must be informed of their right to dispute the accuracy or completeness of their consumer report information with the consumer reporting agency.[77] After being informed that they are the subject of adverse action, the consumers may dispute any part of the report. Even if the dispute is unwarranted, the consumer reporting agency must conduct a "reasonable investigation," notify the furnisher of the information in dispute and include "all relevant information" regarding the dispute that the consumer reporting agency receives from the consumer.[78] The furnisher who receives the dispute from the consumer reporting agency must conduct its own investigation with respect to the disputed information and report the results of the investigation to the consumer reporting agency.[79] The consumer reporting agency must then report the results of its investigation, including the furnisher's response, in writing, to the consumer.[80] The response may include yet another free consumer report.[81]

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insurance companies base their best premiums in part on a credit score of 800 or higher, about 174 million consumers are eligible for an adverse action notice according to the court of appeals' decision.

[77] 15 U.S.C. § 1681m(a)(3)(B). In addition, as part of the 2003 amendments to the FCRA, the consumer is now permitted to dispute the accuracy of the consumer report information directly with the furnisher and need not go through the consumer reporting agency. 15 U.S.C. § 1681s-2(a)(8). The furnisher who receives the dispute must conduct an investigation of the disputed information, review all of the relevant information provided by the consumer and report the results of the investigation to the consumer. *Id.*

[78] 15 U.S.C. § 1681i(a)(1)-(2).

[79] 15 U.S.C. § 1681s-2(b).

[80] 15 U.S.C. § 1681i(a)(6)(A).

[81] 15 U.S.C. § 1681i(a)(6)(B)(ii).

In addition to the cost of providing free consumer reports to consumers who were not the subject of true "adverse action" because their premiums actually were lower than they otherwise would have been, the court of appeals' decision will require consumer reporting agencies to hire hundreds of employees to respond to thousands of consumer calls inquiring as to the consumer report information that caused them to be the subject of "adverse action" notices.

The structure of the FCRA, particularly as amended in 2003, demonstrates that Congress could not have intended to impose so significant a burden on the consumer reporting agencies. In 2003, the FCRA was amended to permit consumers to obtain, free of charge, a copy of all consumer report information on the consumer maintained by each nationwide consumer reporting agency and each nationwide specialty consumer reporting agency.[82] This information may be obtained each year. Thus, consumers may obtain at least three consumer reports each year at no cost. If the court of appeals' interpretation is correct, then, knowing that the vast majority of all consumers would be entitled to obtain a free copy of their consumer report because they would suffer insurance adverse action,[83] Congress nonetheless amended the FCRA to provide yet more free copies of the same consumer report information to the same consumers. Such a result is demonstrably absurd and should be avoided.

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[82] 15 U.S.C. § 1681j(a)(1)(A).

[83] When insurance companies use insurance scores to set premiums at the time of policy renewal (usually annually), under the court of appeals' interpretation, consumers who are charged a premium other than the premium charged to the potential best customer based on consumer report information would be entitled to an adverse action notice.

III. THE COURT OF APPEALS' INTERPRETATION OF ADVERSE ACTION IGNORES THE FCRA'S ACTUAL LANGUAGE AND THE DRAFTING PROCESS LEADING TO THE 2003 AMENDMENTS.

In holding that adverse action includes those instances in which a consumer is not charged the same insurance premium rate that would be charged to another consumer with the top potential insurance score, the court of appeals ignores Congress' actual legislative determinations when amending the FCRA to add a risk-based pricing notice requirement in the credit context.[84]

When Congress wanted to add a requirement that consumer report users inform consumers when the consumers were being charged less favorable rates than other consumers, it did so expressly, in a separate subsection, requiring such notice whenever credit was offered "on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through" the consumer report user, "based in whole or in part on a consumer report."[85]

If the court of appeals is correct, then an even more onerous obligation was imposed upon insurers by negative implication. That is, because Congress *did not* amend the definition of "adverse action" in the insurance context,[86] the existing definition of adverse action means that each consumer who did not receive the lowest possible premium rate based on consumer report information – a rate offered only to the small fraction of insureds who have the top potential insurance score – was the subject of adverse action. The definition of adverse action in the insurance context says nothing about "top potential score" or "lowest possible premium," but the court of appeals reads these

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[84] 15 U.S.C. § 1681m(h).

[85] 15 U.S.C. § 1681m(h)(1).

[86] 15 U.S.C. § 1681a(k)(B)(i).

terms into the definition, despite Congress' demonstrated ability to make such distinctions when it so chooses.

The court of appeals' decision also ignores the legislative drafting process that led to the risk-based pricing notice in the credit context. Prior to the enactment of the 2003 amendments to the FCRA, in October 2003, the U.S. Senate Banking Committee staff circulated a draft amendment to the FCRA that would create a "risk-based pricing" notice for creditors *and insurers*.[87] Under this proposal, a consumer notice would be required "if any person uses a consumer report in connection with a grant, extension or other provision of credit *or insurance* on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person."[88] The notice would say, in pertinent part, that the "terms offered to the consumer were set based on information from a consumer report."[89]

The FTC wanted Congress to adopt the risk-based pricing amendment that included the reference to insurance and insurers.[90] To this end, the FTC met with insurance industry representatives to gain their support.[91] In return for the industry's support, the FTC was "willing to prepare [Senate Committee] report language to clarify the definition of adverse action" including a "move away from" the position previously articulated by the FTC staff in a staff opinion letter.[92]

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[87] October 14, 2003 email from Catherine Paolino to the Credit Task Force. A copy of the email and attached Senate Banking Committee fax appear at Appendix at A1-A5.

[88] Appendix at A3.

[89] Appendix at A4.

[90] *See* October 17, 2003 and October 20, 2003 emails from Catherine Paolina. A copy of the emails are attached at Appendix at A6-A11.

[91] Appendix at A6-A7.

[92] October 20, 2003 email. Appendix at A10-A11. The FTC's offer to "clarify" the FCRA's definition of "adverse action" in legislative history is inconsistent with the FTC's statements to the Ninth Circuit Court of Appeals that the FCRA was clear in the application of its adverse action

(Continued on following page)

The Senate Banking Committee staff decided to remove insurance from the scope of the risk-based pricing amendment, and the version Congress enacted as part of the 2003 amendments applied only to creditors.[93] If Congress had wanted to impose a risk-based pricing notice obligation upon insurers, the FTC would have written, and presumably Congress would have adopted, legislative history to that effect.[94]

This history reveals that a definition of "adverse action" in the insurance context that includes the *implicit* risk-based pricing component found by the court of appeals cannot be reconciled with Congress' demonstrated ability to impose such requirements expressly and the drafting history establishing that Congress considered such an explicit amendment and elected *not* to include it.

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notice requirements to insurance risk-based pricing based on credit reports and that any contrary interpretation was "absurd."

Brief of the Federal Trade Commission As *Amicus Curiae* Supporting Appellants and Urging Reversal, filed in *Reynolds v. Hartford Financial Services Group, Inc.*, Case No. 03-35695, pp. 13, 14, *available at* http://www.ftc.gov/ogc/briefs/fcrahartford.pdf. The audio recording of this Oral Argument is available at http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=2 (enter Case No. 03-35695).

[93] *See* 15 U.S.C. § 1681m(h). The risk-based notice provision is still not effective because, almost three years after its enactment, the FTC and the Federal Reserve Board have yet to promulgate rules to implement its requirements.

[94] The FTC's negotiations related to the risk-based pricing amendments also revealed that, despite the arguments contained in its *amicus* briefs filed in the appeals in *Reynolds v. Hartford* and the other cases appealed to the Ninth Circuit Court of Appeals, the FTC recognized that interpretations applying the FCRA's adverse action notice requirements to risk-based pricing insurance transactions created significant new compliance burdens, and that its policy concerns were satisfied in the form of adverse action notice given by insurers.

CONCLUSION

This Court should reverse the decision of the court of appeals because, if left uncorrected, the decision subjects consumer reporting agencies, users and furnishers of consumer report information to unlimited liability that is inconsistent with the language and structure of the FCRA. In correcting the court of appeals' error, this Court should hold that a willful violation of the FCRA can only be established by a showing that includes conscious wrongdoing. This Court should further hold that adverse action under the FCRA does not include the failure to charge the consumer the lowest possible insurance premium that would be charged to another consumer with the top potential insurance score.

Respectfully submitted,

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(202) 223-6930

November 13, 2006

From: Paolino, Catherine [CPaolino@aiadc.org]
Sent: Tuesday, October 14, 2003 8:28 AM
To: Credit Task Force; Baldini, Don; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Roeberg, Nicole; Cantor, Drew; Mercado, Moses; Bouchard, Francis; Callanan, Susan
Subject: FCRA – New Notice
Importance: High

Risk Based Pricing Notice.pdf

Though without much notice, please draw your attention to the attached before today's Credit Task Force call.

The Senate Banking Committee is reviewing this language presently. It would add a notice requirement "if any person uses a consumer report in connection with a grant, extension, or other provision of credit or insurance on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person, based in whole or in part on a consumer report, the person shall provide a notice to the consumer in the form and manner required by rules prescribed in accordance with this Subsection (e)." It has an exception if an adverse action notice was provided under Sec. 615(a) and it would require the FTC to make rules. Given the use of "material" and "substantial" the rules would be especially important.

<<Risk Based Pricing Notice.pdf>>

We seem to be hearing that the FTC is advocating this approach. Interestingly, it may imply a different approach to adverse action from the Ball informal opinion letter:

<http://www.ftc.gov/os/statutes/fcra/ball.htm>
http://www.ftc.gov/os/statutes/fcra/ball.htm

Here is a link to the FCRA as it presently stands:
<http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf>
http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf

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Risk-Based Pricing Notice

§ 603

(u) Credit and Creditor – The terms 'credit' and 'creditor' have the same meanings as in Section 702 of the Equal Credit Opportunity Act (15 U.S.C. 1691a).

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§ 615

(e) Duties of users in certain credit and insurance transactions.

(1) Subject to rules as provided in paragraph (5), if any person uses a consumer report in connection with a grant, extension or other provision of credit or insurance on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person, based in whole or in part on a consumer report, the person shall provide a notice to the consumer in the form and manner required by rules prescribed in accordance with this Subsection (e).

(2) Exceptions. No notice shall be required under this Subsection (e) if:

(A) The consumer applied for specific material terms and was granted those terms, UNLESS those terms were initially specified by the person after the transaction was initiated by the consumer and after it obtained a consumer report; or

(B) The person has provided or will provide a notice to the consumer under Subsection (a)

of this Section in connection with the transaction.

(3) A person that is obligated to provide a notice under Subsection (a) of this Section cannot meet that obligation by providing a notice under this Subsection (e).

(4) Content and Delivery of Notice. A notice under this Subsection (e) shall include at least the following information –

(A) That the terms offered to the consumer were set based on information from a consumer report;

(B) Identification of the consumer reporting agency that furnished that report;

(C) That the consumer can obtain a copy of a consumer report from that consumer reporting agency without charge; and

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10/14/03 TUE 09:27 FAX SENATE BANKING COMM 003

(D) The contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis).

(5) Rulemaking. The Federal Trade Commission and the Board of Governors of the Federal Reserve System shall jointly prescribe rules, in accordance with Section 553 of Title 5, United States Code, to carry out the purposes of this Subsection (e). These rules may address but are not limited to:

(A) The form, content, time, and manner of delivery of any notice under this Subsection (e);

(B) Clarification of the meaning of terms used in this Subsection (e), including what terms are material and when terms are materially less favorable;

(C) Exceptions to the notice requirement under this Subsection (e) for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers; and

(D) A model notice that may be used to comply with this Subsection (e).

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Also, the bill must specify that:

Rulemaking. Regulations required by Section 615(e)(5) of the Fair Credit Reporting Act, as added by this Section, shall be issued in final form not later than one year after the enactment of this Act.

Effective Date. The amendments made by Subsection ___ shall become effective on the effective date of regulations prescribed in accordance ~~with Subsection~~ ___.

From: Paolino, Catherine [CPaolino@aiadc.org]
Sent: Friday, October 17, 2003 5:30 AM
To: Credit Task Force; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Mercado, Moses; Roeberg, Nicole; Cantor, Drew; Bouchard, Francis; Callanan, Susan; Karr, Gary
Subject: FCRA – New Notice

Importance: High

FCRA – AIA Review Notes on Ris . . .
Risk Based Pricing Notice.pdf

AIA met with the FTC yesterday. While interested in learning more about our industry, they were adamant about not removing insurance from this new risk based pricing notice, (e), and that they would not consider an exception that would allow an alternative initial notice. (The group we met with states that they believe they would be fair in rulemaking and that the existence of (e) helps them to back away from the Ball opinion letter interpreting adverse action in (a).) They seem to be under the impression that they can make (e)(1) reasonable and understandable for insurers through the rulemaking process. While perhaps this may be possible (at best) with respect to "material terms" and "materially less favorable," I do not understand how "available to a substantial proportion of consumers" could be quantifiable and workable in the insurance context. They said for example, if x% [some threshold amount] of your policyholders don't receive a particular specific rate, then the notice would be required. I hope you can help, either by explaining how this concept makes sense or by working with me to develop

real examples of why this is impracticable. They indicated that they would be willing to consider an alternative to the "substantial proportion" approach, but I do not know the degree of their receptivity. In any event, if we are going to respond with suggested language it will need to be asap today.

Lastly, the group we met with indicated that they will be looking for guidance as to how to accomplish the study.

Thanks once again.

-----Original Message-----
From: Paolino, Catherine
Sent: Wednesday, October 15, 2003 4:18 PM
To: Credit Task Force; Baldini, Don; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Mercado, Moses; Roeberg, Nicole; Cantor, Drew; Bouchard, Francis; Callanan, Susan

Subject: FCRA – New Notice
Importance: High

Kindly review my attached notes on this issue asap; they are mostly based on the Credit Task Force call yesterday afternoon. Please let me know your suggestions overall as well as your specific thoughts on advocating an initial notice requirement. Thank you for your help.

<<FCRA – AIA Review Notes on RiskBased Pricing Notice – 101503.doc>>

-----Original Message-----
From: Paolino, Catherine
Sent: Tuesday, October 14, 2003 11:28 AM

To: Credit Task Force; Baldini, Don; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Roeberg, Nicole; Cantor, Drew; Mercado, Moses; Bouchard, Francis; Callanan, Susan

Subject: FCRA – New Notice
Importance: High

Though without much notice, please draw your attention to the attached before today's Credit Task Force call.

The Senate Banking Committee is reviewing this language presently. It would add a notice requirement "if any person uses a consumer report in connection with a grant, extension, or other provision of credit or insurance on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person, based in whole or in part on a consumer report, the person shall provide a notice to the consumer in the form and manner required by rules prescribed in accordance with this Subsection (e)." It has an exception if an adverse action notice was provided under Sec. 615(a) and it would require the FTC to make rules. Given the use of "material" and "substantial" the rules would be especially important.

<<Risk Based Pricing Notice.pdf>>

We seem to be hearing that the FTC is advocating this approach. Interestingly, it may imply a different approach to adverse action from the Ball informal opinion letter:

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http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf

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From: Paolino, Catherine [CPaolino@aiadc.org]
Sent: Monday, October 20, 2003 11:29 AM
To: Credit Task Force; McNamara, Glenn; Callanan, Susan; Bouchard, Francis
Cc: Snyder, David; Cantor, Drew; Roeberg, Nicole; Mercado, Moses; Unnewehr, David; McManamy, Sean; Karr, Gary; Zielezienski, Stephen; Goldberg, Eric
Subject: FCRA – FTC – New Notice

Risk Based Pricing Notice – 10. . .
FCRA – AIA Review Notes on Ris. . .

Drew Cantor and I spoke again with Andrew Smith of the FTC this morning. We reviewed a number of issues, as outlined below.

SCOPE – He remains firm in his belief that all kinds of consumer reports should be subject to the notice requirement, not just those that relate to credit.

"TERMS OFFERED" INTERPRETATION – His thought with respect to (e)(4)(A) is that no further detail would be required for this item, only a simple statement that the consumer report was used to set the terms of the offer. He says that he understands that it would be an operational burden to itemize the ways that terms might differ and he recognizes that an adverse action notice puts people on the defensive and he pictures that this notice would [sic] neutral in nature. He indicated that he is willing to put together report language to this effect.

AMBIGUITIES, PRACTICAL PROBLEMS AND TRIGGER – He indicates that he is more concerned with over notification for adverse action than for this risked based pricing notice; he thinks it would be fine if everyone

who does not get an adverse action notice gets this general notice. If that is acceptable, the ambiguity in (e)(1) is not important and the issue turns on line between the adverse action notice and the risk based pricing notice (not the line between the risk based pricing notice and no notice). He indicated that he thinks this notice would be beneficial to insurers as there has been litigation both when adverse action notices are and are not provided. He stated that he would be willing to prepare report language to clarify the definition of "adverse action" (though it would be a move away from the Ball opinion letter, I do not know how he would propose to define the term).

Let's plan to discuss this on tomorrow's Credit Task Force call. Are there both pros and cons to this moving forward?

FYI – Attached are the draft and our notes.

<<Risk Based Pricing Notice – 101403.pdf>> <<FCRA – AIA Review Notes on RiskBased Pricing Notice – 101703.doc>>

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(640)

Nos. 06-84, 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR FARMERS INSURANCE COMPANY OF OREGON, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION ADDRESSED BY AMICI

Like other insurance companies, *amici* face a wave of nationwide class action litigation by private plaintiffs alleging "willful" violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (FCRA) and seeking to obtain aggregated "statutory" damages. In this brief, *amici* will address the following question:

Whether the Court should adopt objective guideposts that should serve as indicia that an insurance company has made a good-faith effort to comply with the FCRA's notice provisions, thus precluding a finding of willfulness. Specifically, *amici* propose that an insurance company may not be held liable for a "willful" violation of the FCRA if it: (1) acts in compliance with the requirements expressly set forth in the statute and in the sample notice formally adopted by the responsible federal agency, even if it does not strictly comply with subsequently adopted, judicially-created requirements; or (2) relies in good faith on the advice of counsel on statutory issues of first impression.

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BRIEF OF FARMERS INSURANCE CO. OF OREGON, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE[1]

Amici Curiae Farmers Insurance Company of Oregon, Inc., Farmers Group, Inc., and several of their affiliates (Farmers) are defendants in many nationwide class actions pending in federal courts throughout the country alleging violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (FCRA). *See, e.g., In re Farmers Ins. Co. FCRA Litig.*, No. 03-158, 2006 U.S. Dist. LEXIS 27290 (W.D. Okla. Apr. 13, 2006) (consolidated MDL proceeding); *Ashby v. Farmers Ins. Co. of Or.*, No. 01-1446, 2004 U.S. Dist. LEXIS 21060 (D. Or. Oct. 7, 2004) (Brown, J.). In each of these actions plaintiffs do not claim any actual injury or compensable loss.

Like petitioners and the other insurance company *amici*, Farmers is directly affected by the pernicious effects of the Ninth Circuit's expansive ruling in *Reynolds v. Hartford Fin. Servs. Group*, 435 F.3d 1081 (9th Cir. 2006). Farmers provided to its insureds FCRA notices that tracked exactly the content requirements of the statute and the sample notice promulgated by the Federal Trade Commission. *See Ashby*, 2004 U.S. Dist. LEXIS 21060, at *7-8. In light of the issues of first impression arising from application of the FCRA notice requirements to the insurance industry's use of credit information for risk-based pricing, Farmers obtained legal ad-

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

vice from knowledgeable counsel with expertise on FCRA issues. *See Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 3-4 (D. Or. Sept. 9, 2005); *id.*, slip op. at 2-3 (D. Or. Jan. 17, 2006). Yet despite these good faith efforts to comply, Farmers faces claims for several billions of dollars in aggregated statutory damages for alleged "willful" violations of the FCRA.

SUMMARY OF ARGUMENT

The Court has granted certiorari to determine whether the Ninth Circuit erred in holding that petitioners may be liable for "willfully" violating the FCRA. In this case, the Ninth Circuit interpreted the phrase "increase in any charge for . . . insurance" in the definition of "adverse action" (15 U.S.C. § 1681a(k)(1)(B)(i)) – the trigger requiring insurers to provide notices under the FCRA – to require insurers to send notices to consumers who received *discounts* on their insurance policies. The panel then imposed additional content requirements for these notices above and beyond those enumerated by the legislative and executive branches. It further compounded these errors by holding that the failure to abide by these new, judicially-created requirements may be a "willful" violation of the FCRA deserving of a potentially annihilating monetary sanction. There is no basis in the text of the statute, legislative history, or judicial precedent for these expansive interpretations.

In this brief, Farmers will propose two objective guideposts that should serve as indicia that an insurance company has made a good-faith effort to comply with the FCRA's notice provisions, thus precluding a finding of willfulness.

First, where an insurance company complies with the requirements expressly set forth in the statute and the sample notice formally adopted by the responsible federal agency, a court's *post hoc* decision to add extra-statutory notice requirements cannot be the basis for a finding of willfulness.

Second, an insurer's reliance on the advice of counsel in formulating its FCRA policies also precludes a finding of willfulness.

Either one of these factors alone negates the requisite state of mind to hold the defendant liable for statutory or punitive damages. Taken together, the factors demonstrate conclusively that a company acted in good faith and cannot be held liable for "willful" noncompliance with the FCRA.

ARGUMENT

As petitioners' briefs establish, "willfulness" requires a "knowing" disregard of the law, and not the lesser standard approximating gross negligence adopted by the Ninth Circuit. GEICO Pet. 22-24; Safeco Br. 17-37. Congress enacted a two-tiered standard for civil liability in the FCRA: A plaintiff may obtain actual damages on a showing of a "negligent" violation of the FCRA, *see* 15 U.S.C. § 1681o(a)(1), while punitive and statutory damages are available only on the higher showing of "willful" noncompliance. *Id.* § 1681n(a). It is axiomatic that a defendant must know what the law requires before being held liable for "willfully" violating that law. In its decision, however, the Ninth Circuit imposed a broad definition of "increase in any charge for . . . insurance" in the definition of "adverse action," and it also imposed new content requirements for FCRA notices that are nowhere to be found in the statute itself. *Reynolds*, 435 F.3d at 1094-95. Indeed, the court did not even purport to provide an "exhaustive" list of the content requirements, thereby leaving insurers in peril of a subsequent expansion of the list. *Id.* at 1085 n.2, 1095 n.14.

In light of the tremendous uncertainty posed by the Ninth Circuit's decision, under which an insurer's failure to comply with requirements that are announced *post hoc* by a federal court may lead to liability in private litigation, Farmers respectfully submits that the Court should articulate objective guideposts to which insurers can conform their FCRA policies and avoid a finding of willfulness. Farmers focuses on

two such criteria: compliance with the specific content requirements of the statute and formally promulgated FTC guidance; and reliance on the advice of counsel.

I. An Insurer Cannot Willfully Violate The FCRA By Acting In Compliance With The Requirements Expressly Set Forth In The Statute And Formal FTC Guidance

When an insurance company takes an "adverse action," which action is defined to include an "increase in any charge for . . . insurance," the FCRA requires that the insurer send the consumer a notice. 15 U.S.C. § 1681a(k)(1)(B)(i), § 1681m(a). The Ninth Circuit's decision interpreted these terms in an expansive manner that is not supported by the text of the statute or the legislative history. The court further erred by engrafting additional content requirements for "adverse action" notices beyond the discrete list set forth in Section 1681m(a)(1)-(3).

Farmers agrees with petitioners and other *amici* that charging anything less than the best possible rate is *not* an "increase in any charge for . . . insurance" constituting an "adverse action" that requires a notice under the FCRA, as the Ninth Circuit held. *See Reynolds*, 435 F.3d at 1093. Nonetheless, Farmers conservatively opted to issue "adverse action" notices to all insureds that informed them of the "action" (their premium, based in part on consumer information) and who did not receive the most favorable premium discount based in whole or in part on information contained in a consumer report. *In re Farmers Ins. Co.*, 2006 U.S. Dist. LEXIS 27290, at *9 n.4, 26 n.10.

The notices that Farmers sent, to a very broad group of insureds, included all of the content specified in the FCRA and in the sample notices formally promulgated by the FTC. But because the notices stopped short of affirmatively *characterizing* Farmers' pricing as "unfavorable" or "adverse," private plaintiffs have sued Farmers in federal courts across the country. Compliance with the express statutory and ad-

ministrative notice requirements, however, should preclude a finding of willfulness notwithstanding any additional requirements that might later be imposed by a federal court, including those that the Ninth Circuit erroneously adopted.

1. The FCRA provision at issue in these cases includes a discrete list of the required content for "adverse action" notices: (1) the adverse action (i.e., the premium, based in part on consumer information); (2) the name and contact information for the consumer reporting agency that furnished the report; (3) a statement that the reporting agency did not take the action and cannot explain the specific reasons for it; and (4) a notice of the consumer's rights to obtain a free copy of the report and to dispute the accuracy or completeness of this information. 15 U.S.C. § 1681m(a)(1)-(3). Farmers' notice contained all of this content. *See Ashby*, 2004 U.S. Dist. LEXIS 21060, at *7-8.

In its 1996 amendments to the FCRA, Congress directed the FTC to prescribe the required content of notices setting forth users' responsibilities and to promulgate a sample notice. *See* 15 U.S.C. § 1681e(d)(2) ("The Federal Trade Commission shall prescribe the content of notices . . . ."). Pursuant to this express statutory delegation, and after notice and an opportunity for comment, the FTC promulgated the following "Notice of Rights and Duties Under the Fair Credit Reporting Act":

> **Adverse Actions Based on Information Obtained From a [Consumer Reporting Agency ("CRA")]**
>
> If a user takes any type of adverse action that is based at least in part on information contained in a consumer report, the user is required by Section 615(a) of the FCRA [15 U.S.C. § 1681m(a)] to notify the consumer. The notification may be done in writing, orally, or by electronic means. It must include the following:
>
> - The name, address, and telephone number of the CRA (including a toll-free telephone number, if it is a nationwide CRA) that provided the report.

- A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made.
- A statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the CRA if the consumer requests the report within 60 days.
- A statement setting forth the consumer's right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.

15 C.F.R. pt. 601, App. C (62 Fed. Reg. 35,595, 35,596-97 (July 1, 1997); 69 Fed. Reg. 69,776, 69,798 (Nov. 30, 2004)). Once again, Farmers' notice contained all of this required information. *See Ashby*, 2004 U.S. Dist. LEXIS 21060, at *7-8.

Congress specifically directed that "a consumer reporting agency *shall be in compliance* with this subsection if it provides a notice under paragraph (1) that is substantially similar to the Federal Trade Commission prescription under this paragraph." 15 U.S.C. § 1681e(d)(2) (emphasis added). *See also* 16 C.F.R. § 601.2 (providing that a consumer reporting agency that sends Appendix C is in compliance with its duties under 15 U.S.C. § 1681e(d) and § 1681g(c)).[2]

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[2] The FTC's sample notice is entitled to judicial deference because "Congress delegated authority to the agency generally to make rules carrying the force of law, and that . . . interpretation . . . was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). *See also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Yet, remarkably, the Ninth Circuit considered the text sufficiently "clear" and "unambiguous" to support a ruling "independent[] of" and without the need to "defer to" the FTC's interpretation. *Reynolds*, 435 F.3d at 1092 & n.9 ("As the statute's text

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2. Without citing or considering the FTC's sample notice, the Ninth Circuit extended insurers' obligations well beyond these specific statutory and regulatory provisions and read several new content requirements into the statute. Under *Reynolds*, insurance companies now must also: (1) "describe the [adverse] action"; (2) "specify the effect of the action upon the consumer"; (3) "identify the party or parties to the action"; (4) "inform[] [the consumer] that his rate for insurance was increased because of information in his credit report" even if his rate is lower than it had been prior to consideration of credit report information; and (5) if a "family" of "affiliated companies [are] responsible for taking an adverse action," the insurer must "identif[y] those companies and their respective roles." *Reynolds*, 435 F.3d at 1084-85, 1094-95, 1096. Further, the Ninth Circuit made clear that it might add still additional – but presently unspecified – requirements in the future.[3]

The Ninth Circuit thus effectively rewrote the statutory language from "notice *of the* adverse action" (15 U.S.C. § 1681m(a)(1)) to "notice *that the action taken was adverse*" or "notice *why the action taken was adverse*." After acknowledging that "notice of the adverse action" was an undefined term in the FCRA, the Ninth Circuit panel engrafted new requirements that such a notice must contain. "[A]t a minimum," the court held, these notices must include more

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is clear, we need not resort to either the agency's interpretations or the statute's legislative history.").

[3] The panel stated, "[w]e do not decide whether a fuller description of what specific information was adverse is required as this question is not before us." *Id.* at 1094 n.14. *See also id.* at 1085 n.2 ("We do not intend this list to be exhaustive."). Thus, the panel's decision is an invitation to private plaintiffs and the lower courts to hold insurance companies liable for "willful" noncompliance because they are unable to predict additional content requirements that may later be divined by the federal courts.

than the content requirements specified in Section 1681m(a)(2), and the insurer must, *inter alia*, "*describe* [and] . . . specify the effect of the action upon the consumer . . . ." *Reynolds*, 435 F.3d at 1094-95 (emphasis added).

The mere fact that Congress did not separately define "notice of the adverse action" is not a license for the courts to rewrite that phrase to impose additional obligations upon insurers. In fact, Congressional silence in this particular situation means just the opposite. Section 1681m(a), the notice provision at issue in these cases, stands in stark contrast to other provisions in the FCRA and related consumer protection statutes in which Congress expressly requires a characterization of the actions taken. For example, Section 1681j(b) states that a consumer is entitled to a free credit report "after receipt by such consumer of a notification pursuant to section 1681m of this title, or of a notification from a debt collection agency affiliated with that consumer reporting agency *stating that the consumer's credit rating may be or has been adversely affected*." 15 U.S.C. § 1681j(b) (emphasis added).

Here, Congress drew a distinction between a Section 1681m notification and a Section 1681j debt collection agency notification – and only the latter must contain a statement characterizing the action taken. This Court has explained the rule as "well settled" that the inclusion of particular language in one section of a statute, and the omission of that same language in another section, creates a general presumption "that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (internal citations omitted). The Ninth Circuit's decision flies in the face of that rule and is inconsistent with the structure of the statute.

The Ninth Circuit's reading also contravenes formal guidance from the FTC, the agency responsible for enforcing the FCRA against insurers. The FTC has published Commentary that is a "guideline intended to clarify how the

[FTC] will construe the FCRA in light of Congressional intent as reflected in the statute and its legislative history." 16 C.F.R. pt. 600 App. (Introduction ¶ 1). This Commentary clarifies that a user is not required to characterize or otherwise describe the action taken on the basis of consumer information: "Creditors should not confuse compliance with *section [1681m(a)], which only requires disclosure of the name and address of the consumer reporting agency*, and compliance with the Equal Credit Opportunity Act [ECOA], *. . . which require[s] disclosure of the reasons for adverse action*." *Id.* *See* 12 C.F.R. § 202.9(b)(2) (requiring "statement of reasons for adverse action" for ECOA notices).[4]

Thus, neither Congress nor the responsible executive-branch agency has required insurers to characterize their pricing decisions as "unfavorable" – and for good reason: Characterizing FCRA notices as the Ninth Circuit has required would mislead a large number of consumers who received a benefit from the consultation of consumer information. Because many of these consumers received discounts, describing that favorable result as somehow "unfavorable" would confuse consumers and defeat the goal of the FCRA to provide accurate information. *See generally* 15 U.S.C. § 1681 (congressional findings); *Matthiesen v. Banc One Mortg. Corp.*, 173 F.3d 1242, 1245 (10th Cir. 1999) ("The purpose of FCRA is to ensure accuracy and fairness in credit reporting and to require that such reporting is confidential, accurate, relevant, and proper.").

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[4] *See also* Official Staff Commentary to Regulation B, 12 C.F.R. pt. 202, cmt. 202.9(b)(2)-9 ("The ECOA requires disclosure of the principal reasons for denying or taking other adverse action on an application for an extension of credit. The Fair Credit Reporting Act (FCRA) requires a creditor to disclose when it has based its decision in whole or in part on information from a source other than the applicant or from its own files.").

Farmers and other insurers should not be penalized for complying with the specific content requirements of the statute itself. But most certainly these insurers cannot "willfully" violate the statute based on the Ninth Circuit's freshly-minted content addenda.

3. As a matter of law, providing an "adverse action" notice that contains the requisite content specified by Congress and the FTC cannot constitute "willful" noncompliance. *Amici* are aware of no case in which compliance with an agency standard has been ruled a willful violation of the statute addressed by the standard. Instead, federal appellate decisions in analogous circumstances hold that the opposite is true, that compliance with agency interpretations disproves "willfulness."

As one court has explained, a defendant's good faith compliance with agency standards negates a finding of willfulness: "A company cannot be found to have willfully violated a standard if it exhibited a good faith, reasonable belief that its conduct conformed to law, . . . or if it made a good faith effort to comply with a standard . . . ." *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1263 (D.C. Cir. 2003) (citations omitted). *See also Cook v. United States*, 855 F.2d 848, 850 (Fed. Cir. 1988) (declaring *per se* rule that the federal agency's reliance in good faith on the Secretary of Labor's advice disproved a "willful" violation of the Fair Labor Standards Act).[5]

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[5] Other decisions confirm that good faith efforts to comply with regulatory standards cannot support a finding of a "willful" violation of regulations. *Accord A.J. McNulty & Co. v. Sec'y of Labor*, 283 F.3d 328, 338 (D.C. Cir. 2002) ("A good faith, reasonable belief by an employer that its conduct conformed to the law negates a finding of willfulness.") (quoting *Sec'y of Labor v. Keco Indus.*, No. 81-263, 1987 WL 89096, at *11 (O.S.H.R.C. Mar. 27, 1987); *McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1047 (7th

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Indeed, numerous courts have held that compliance with government standards is so plainly inconsistent with a finding of malice or conscious wrongdoing that it bars the imposition of punitive damages altogether. *See, e.g., Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (punitive damage award barred in part because no government agency had ever required certain design feature); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (punitive damages prohibited where defendant complied with federal safety standards); W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 n.41 (5th ed. 1984) ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages.").

An insurer's ability to rely on the plain language of the statute is particularly important where, as here, it has not been subject to extensive prior construction. For example, in *Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993), the Fifth Circuit considered whether the defendant willfully violated the provision of the FCRA now contained in 15 U.S.C. § 1681m(d)(1), which requires that written solicitations contain a "clear and conspicuous" disclosure of certain information. The court held that the defendants' conduct was not "willful" because there was no legal authority, either in the statute or from the FTC, articulating just how conspicuous the required FCRA notice must be. *Id.* at 294-96 ("There was no prior guidance to suggest that TRW's notice was insufficient, and we cannot conclude that TRW knowingly and intentionally obscured the notice in conscious disregard of consumers' rights."). The court reversed the award of puni-

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Cir. 1989) ("A violation is not willful when it is based on a non-frivolous interpretation of [an agency's] regulations.").

tive damages on the ground that the defendants' conduct was not willful. *Id.* at 296.[6]

4. Permitting a court to find a willful violation based on an interpretation of the FCRA requiring content beyond that expressly set forth in the applicable statute and FTC's formally promulgated sample notice – especially in the absence of any prior, settled judicial, administrative, or industry construction to the contrary – would raise serious due process issues.

A finding of willfulness subjects the defendant to potentially massive statutory and punitive damages.[7] This Court

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[6] *Accord Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995) (affirming dismissal of claim alleging willful violation of law "[b]ecause this is a case of first impression"); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 702-03 (3d Cir. 1994) (refusing to find defendants liable for a "willful" violation of the FLSA in a "case of first impression" because the defendants "did not in any way thwart settled FLSA doctrine"); *Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985) (finding no willful violation because "case law was split at that time"); *Murray v. New Cingular Wireless Servs., Inc.*, 432 F. Supp. 2d 788, 794 (N.D. Ill. 2006) (holding that defendant's notice violated the "clear and conspicuous" requirement of the FCRA, but that this violation was not "willful" because there was insufficient guidance for defendant); *Menton v. Experian Corp.*, No. 02-4687, 2003 WL 21692820, at *4 (S.D.N.Y. July 21, 2003) (refusing to hold defendant liable for "willful" violation of the FCRA based on the fact that it "narrowly construed" an "undefined" statutory term and defendant acted without "the benefit of prior court decisions addressing this issue"); *Hearst Corp. v. Stark*, 639 F. Supp. 970, 980 (N.D. Cal. 1986) (no finding of willful copyright infringement as a matter of law when wrongfulness of defendant's action depended on unsettled question of law).

[7] Whether denominated "statutory" or "punitive," damages awarded that go beyond compensation for actual injury are punitive-in-fact. *See, e.g., United States v. Halper*, 490 U.S. 435, 448 (1989), *overruled on other grounds by Hudson v. United States*,

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has repeatedly "admonished" that such civil punishment "pose[s] an acute danger of arbitrary deprivation of property," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)), and it has emphasized that "'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment.'" *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)). The Ninth Circuit's approach, however, contravenes these fundamental principles.

By subjecting a defendant to potentially enormous punishment even if the defendant reasonably and in good faith adheres to the statute's express terms, complies with the FTC's formally promulgated notice, and seeks the advice of counsel, the Ninth Circuit's interpretation deprives defendants of all objective referents to guide their conduct, creating enormous vagueness problems and inviting arbitrary and discriminatory enforcement. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915) ($6,300 civil penalty violated due process where defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief" *even assuming* that defendant "should have

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522 U.S. 93, 101 (1997) ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."); *Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986) ("[S]tatutory damages serve two purposes – compensatory and punitive."). Accordingly, these damages implicate the same due process concerns. *See Halper*, 490 U.S. at 448 ("'[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law.'") (quoting *Hicks v. Feiock*, 485 U.S. 624, 631 (1988)).

known that the Supreme Court of the State . . . might hold the [conduct] unreasonable"); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."). *See also Amicus* Br. of Ford Motor Co. 4-10.

The Ninth Circuit's interpretation would permit massive punishment based merely upon the after-the fact determination that the defendant had acted pursuant to legal interpretations that are "creative but unlikely," not "tenable," "implausible," the product of "creative lawyering," "indefensible," or "unreasonab[ly] . . . erroneous." *Reynolds*, 435 F.3d at 1099. But such amorphous characterizations are not standards at all, and "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). The Ninth Circuit's interpretation would render the FCRA just as unconstitutionally vague as the Pennsylvania statute at issue in *Giaccio*, which this Court struck down because it had been judicially interpreted to authorize juries to impose, and courts to set, costs of prosecutions on an acquitted defendant "if they [found] that his conduct, though not unlawful, [was] 'reprehensible in some respect,' 'improper,' outrageous to 'morality and justice,' or that his conduct was 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs' or that though acquitted 'his innocence may have been doubtful.'" *Id.* at 403-04 (citations omitted).

Indeed, because the FCRA is apparently clear on its face, allowing the imposition of statutory or punitive damages based on the Ninth Circuit's retroactive application of its new interpretation to pending cases would represent a particularly

egregious deprivation of due process. *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (there is an even "potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation"); *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 281 (1994) ("The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question.").

Consequently, this Court should reject the Ninth Circuit's interpretation of the FCRA in order to avoid, rather than create, constitutional conflicts. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("It is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.").

5. An application of these principles compels a reversal of the Ninth Circuit's decision. The court's expanded definition of "adverse action" to include charging anything less than the best possible rate is found nowhere in the text of the statute or its legislative history. *See* GEICO Pet. 26-28. But even if the federal courts are to infer such a requirement, certainly the petitioners are not "willfully" liable for failing to anticipate that ruling.

Moreover, when an insurer (such as Farmers) sends a notice to a broader group of customers, that insurer may not be held "willfully" liable for failing to predict judicially-created content requirements above and beyond the discrete list explicitly set forth in the statute (15 U.S.C. § 1681m(a)(1)-(3)) and in the FTC's sample notice (15 C.F.R. pt. 601, App. C).

II. Good Faith Reliance On The Advice Of Counsel Is A Defense To A Charge Of Willfully Violating The FCRA

Farmers has cited its reliance on counsel in formulating its FCRA notice as a defense to plaintiffs' claims that Farmers willfully violated the statute. The district courts, however, have struggled with the continued viability of this defense in light of the Ninth Circuit's ruling in *Reynolds*. In Farmers' case, the first two decisions the district court rendered after the initial *Reynolds* opinions rejected this defense outright. Although the district court subsequently permitted Farmers to assert this defense (following the Ninth Circuit's third and final decision now under review), it warned that "[t]he new opinion in *Reynolds* . . . leaves open the possibility, *albeit by a small margin*, that an insurer might be able to establish it did not act willfully in formulating an unlawful adverse action notice, if the formulation of the notice was based on advice of counsel." *Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 8 (D. Or. Feb. 28, 2006) (emphasis added).[8]

Good faith reliance on the advice of counsel should defeat a finding of willfulness. Past precedents of this Court hold that civil defendants may not be held liable for "willful" or "reckless" noncompliance if the defendant sought and followed counsel's advice. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 129-30 (1985). The Ninth Circuit's decision in *Reynolds* improperly negates this presumption and holds that advice of counsel is no longer sufficient to rebut willfulness. The court further clouded the continuing viability of an advice of counsel defense by explaining that

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[8] Given the impact of *Reynolds* and the similarity of the legal issues presented in the cases now under review, the court stayed the *Ashby* action pending this Court's disposition of this appeal. *Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 3-4 (D. Or. Oct. 30, 2006).

evidence of counsel's advice *may* be used to rebut "willfulness" only in "*some*" – but presumably not all – cases. *Reynolds*, 435 F.3d at 1099.

The court's proffered basis for refusing to hold that reliance on counsel negated "willfulness" was its concern that such a rule would "create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* In so ruling, the Ninth Circuit improperly shifted the focus from the *defendant's* actions to the reasonableness of *counsel's* advice. *See id.* ("Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation."). The panel expressed its concern that allowing this defense to rebut "willfulness" would promote "creative lawyering." *Id.* It held that petitioners' interpretation of an issue of "first impression" – that an initial insurance charge to a new customer does not constitute an "increase in any charge for" insurance and thus does not represent an "adverse action" – was "implausible" and that reliance on counsel "[was] not dispositive" in such a circumstance. *Id.* at 1090, 1099. The panel then suggested that in "some" cases in which this defense is appropriate, "the testimony of the company's executives and counsel" is necessary to establish it. *Id.* at 1099.

The lower courts have been constrained by these sweeping statements from even allowing defendants (such as Farmers) to assert an advice of counsel defense. In fact, the same district court that decided the cases under review here warned that this defense survives *Reynolds* only "by a small margin . . . ." *Ashby v. Farmers Ins. Co. of Or.*, No. CV-01-1446, slip op. at 8 (D. Or. Feb. 28, 2006). This defense should not only be *permissible* in all cases, it should continue to serve as presumptive evidence of non-willfulness.

As a preliminary matter, this Court has already rejected a "more expansive" definition of willfulness that would hinge

on the "reasonableness" of the legal advice rendered, because this would "permit a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect [legal] assumption . . . ." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988).[9]

Further, this Court's prior decision in *Thurston* demonstrates that, as a matter of law, good faith reliance on the advice of counsel negates a finding of "willfulness." In that case, the Court adopted the "reckless disregard" standard of willfulness based on the legislative history of the ADEA. *Thurston*, 469 U.S. at 126. The Court held that the defendants' conduct was not "willful" under even a "reckless disregard" standard:

> TWA certainly did not "know" that its conduct violated the Act. Nor can it fairly be said that TWA adopted its transfer policy in "reckless disregard" of the Act's requirements. The record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA.

Id. at 129. The Court explained that after the amendments to the ADEA, "TWA officials met with their lawyers to determine whether the mandatory retirement policy violated the Act." *Id.* Although the defendants' statutory defense was "meritless" and they had "overlooked" a central legal issue, "[t]here simply [was] no evidence that TWA acted in 'reckless disregard' of the requirements of the ADEA." *Id.* at 124, 130.

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[9] Notably, the stakes here are raised considerably from the comparatively minor effect of a "willful" violation of the provision at issue in *McLaughlin* (an increase in the statute of limitations from two years to three years, *id.* at 129) to the large aggregated statutory and punitive damages that are available, even in the absence of actual injury, upon proof of a "willful" violation of the FCRA notice provisions at issue here.

In the complex regulatory environment governing American business, there will always be open questions as to the precise reach of a particular statute. Companies must be able to rely on qualified counsel to guide their actions – and not be put in peril of extraordinary damages because of *post hoc* determinations by federal courts in litigation. If the company and its counsel misconstrue the statute, the company may be liable under a negligence standard; but in no way can it be said to have "willfully" transgressed the statutory requirements. To the contrary, good faith reliance on the advice of counsel is powerful, if not dispositive, evidence that the company recognized that it is subject to regulatory requirements and has made a good faith effort to conform its conduct and policies to these requirements. As a result, a "willfulness" finding is inappropriate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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November 13, 2006

Nos. 06-84, 06-100

In The Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,

Petitioners

v.

CHARLES BURR, ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL.,

Petitioners

v.

AJENE EDO

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICA'S COMMUNITY BANKERS, AND CONSUMER BANKERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici Curiae will address the following questions:

1. Whether the Ninth Circuit erred in holding that a defendant can be found liable for "willfully" violating the Fair Credit Reporting Act (FCRA), and thus be subject to punitive and statutory damages under 15 U.S.C. § 1681n, upon a finding of reckless disregard of the FCRA's requirements, which is contrary to the holdings of other circuits that "willfully" requires actual knowledge on the part of the defendant that the conduct violated the FCRA.

2. Whether the Ninth Circuit improperly expanded the FCRA by holding that an "adverse action" occurs within the meaning of Section 615 of the FCRA, 15 U.S.C. § 1681m, thereby triggering the requirement to provide notice to an insurance consumer, whenever such a consumer does not get the best insurance coverage at the lowest rate even when the consumer's credit information had no impact (or had a favorable impact) on the rates and terms of the insurance.

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BRIEF FOR THE FINANCIAL SERVICES ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICA'S COMMUNITY BANKERS, AND CONSUMER BANKERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Financial Services Roundtable, the Chamber of Commerce of the United States of America, the Business Roundtable, the Mortgage Bankers Association, the American Bankers Association, the American Financial Services Association, America's Community Bankers, and the Consumer Bankers Association respectfully submit this brief as *amici curiae* in support of petitioners in these two cases.[1]

INTERESTS OF *AMICI CURIAE*

Amici curiae are a coalition of prominent national financial services and business organizations whose members include various companies that are authorized under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, to obtain and use consumer reports for various purposes. Those purposes include issuance of insurance, extension of credit, and employment and rental

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[1] Letters from petitioners and respondents indicating that they consent to the filing of *amicus curiae* briefs have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part. Counsel for *amici curiae* provided legal services to petitioners in No. 06-100 regarding this matter at other stages. No person or entity other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

decisions. Such companies are charged under the FCRA with providing notice to a consumer when they take an "adverse action" against the consumer based on a consumer report.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size, in every industrial sector and from every region of the country. One of its principal functions is to advocate the interests of the business community by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

The Business Roundtable is an association of chief executive officers of leading American companies with more than $4.5 trillion in annual revenues and more than ten million employees. Its member companies comprise nearly one-third of the total value of the United States stock market, and represent over forty percent of all corporate income taxes paid to the United States government. Collectively, its member companies returned more than $112 billion in dividends to shareholders and the American economy in 2005. The Business Roundtable is committed to advocating public policies which ensure vigorous economic growth and a productive workforce in America.

The Mortgage Bankers Association (MBA) is a nonprofit corporation headquartered in Washington, D.C. The MBA represents the real estate finance industry, an

industry that employs more than 500,000 people in virtually every community in the country. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

The American Bankers Association (ABA) is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty States and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States.

Founded in 1916, the American Financial Services Association (AFSA) is the trade association for a wide variety of market-funded providers of financial services to consumers and small businesses. AFSA members are important sources of credit to the American consumer, providing approximately over 20 percent of all consumer credit.

America's Community Bankers (ACB) is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. ACB members, whose aggregate assets are more than $1.5 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

The Consumer Bankers Association (CBA) is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity, and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry.

The CBA represents over 750 federally-insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The substantive and remedial provisions of the Fair Credit Reporting Act (FCRA) govern large sectors of the American economy. The FCRA regulates when consumer reports can be obtained and how consumer reports can be used. The purposes for which a consumer report can be used include not only extensions of credit and underwriting insurance, but also decisions regarding employment, eligibility for a license, and any "legitimate business need for the information * * * in connection with a business transaction that is initiated by the consumer." 15 U.S.C. § 1681b(a)(3)(A)-(F).

The FCRA applies to any person who uses information contained in a consumer report to make such decisions. *See, e.g.*, 15 U.S.C. § 1681m(a). Thus, the FCRA regulates companies regularly involved in finance, such as banks and insurance companies, and also companies involved in a wide range of non-finance related business, such as department stores, landlords, employers, cell phone companies, and even cities and towns.

I.

The interpretation by the Ninth Circuit of the FCRA's "willfully" requirement to trigger uncapped punitive damages and statutory damages not based on actual injury to plaintiffs is erroneous and would have a significant detrimental impact on businesses.

A. The FCRA's punitive and statutory damages are not imposed according to any actual damages that a plaintiff may sustain and, accordingly, are penal in nature. Thus, the "willfully" requirement that triggers them must be strictly construed. The "willfully" requirement also is a necessary finding to trigger the Act's criminal provisions. The rule of lenity therefore applies to require a showing of specific intent to violate a known legal duty on the part of defendants before they can be held liable for "willfully" violating the FCRA. The employment case law cited by respondents is not to the contrary because it involved different statutory schemes that did not provide uncapped punitive damages or statutory damages unrelated to proof of actual injury.

B. Interpretation of "willfully," for purposes of the FCRA, to require a showing of specific intent to violate a known legal duty also is warranted in order to avoid doubt about the constitutionality of the federal statute. Significant doubt about the constitutionality of the FCRA's punitive and statutory damages provision arises under the recklessness standard because of the due process limits on excessive or arbitrary awards.

This Court's earliest cases involving violation of the Due Process Clause's substantive limit on private monetary awards arose where statutes fixed damage awards that had no relationship to any actual damages incurred. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915). Building on those cases, the Court has held that the Due Process Clause prohibits "grossly excessive or arbitrary" punitive damages awards. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

When dealing with violations of a technical statute like the FCRA involving reporting of credit, only instances of deliberate lawbreaking could even colorably result in a constitutionally permissible punitive damage award.

Indeed, a prominent factor relevant to the determination of whether a particular award is constitutionally excessive is "the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419. Violations of the FCRA's requirements occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particularly vulnerable persons. Thus, a finding of an unintended, reckless violation of the FCRA, in particular, falls far short of the sort of reprehensible conduct that could support punitive damages. The need for reading the FCRA to require a particularly culpable state of mind is even greater in this situation because statutory and punitive damage awards under the FCRA will generally fail to comply with another significant measure of the constitutionality of such damages: the ratio of those damages to actual damages. *Id.* at 425.

C. A significant litigation risk to defendants sued under the FCRA is caused by the aggregation in class actions of individual claims totaling hundreds of millions (if not billions) of dollars in statutory or punitive damages. Allegations of "willfully" violating the FCRA based on a mere recklessness standard may increase even more that risk because there is a greater likelihood in such cases that a large class will be brought and certified as a damages class action under Federal Rule of Civil Procedure 23(b)(3). That is because courts hold that the FCRA permits plaintiffs in a class to avoid the need to establish any actual damages if they allege willful FCRA violations since the class can seek only statutory damages unrelated to actual individual harm. A recklessness standard such as that adopted by the Ninth Circuit makes it easier for plaintiffs' counsel to make such an allegation of "willfully" consistent with Federal Rule of Civil Procedure 11.

At the same time, the Ninth Circuit's mere recklessness standard for "willfully" violating the FCRA

adversely affects the ability of a defendant to estimate accurately the risk of litigation. A business that determines it can prove that it acted in good faith (*i.e.*, non-willfully), and thus would be willing to litigate to conclusion a case making allegations of willfulness, would be under increased pressure to settle a case that relies on some amorphous standard of recklessness to determine the plaintiffs' eligibility for potentially significant punitive and statutory damages unrelated to any actual harm.

The driving force for such class actions is not compensation for individual harm, but professional plaintiffs and attorneys intent on extracting monetary damages from companies (and their shareholders) for themselves and a class of uninjured consumers. The defendant companies, however, provide valuable services and may have engaged in unintended technical violations of a complex regulatory statute. Such class action lawsuits could, in the aggregate, cost American businesses billions of dollars that are not tied to any actual injury to plaintiffs.

II.

The Ninth Circuit interpreted the term "adverse action" for purposes of the FCRA insurance provisions in a manner that is contrary to the plain language of the statute. The court's application of that term to the issuance of any insurance coverage that is not the best insurance coverage at the lowest possible rate is unprecedented. It would have unreasonably broad practical implications not intended by Congress.

A. The FCRA's adverse action insurance provision is intended to ensure that an insurer gives notice to a consumer when it charges a consumer an increased rate because of credit information in a consumer report. The plain language of the statute specifies that an adverse action occurs only if consumer report information is used,

in whole or in part, to "increase [the] charge for" insurance coverage for that consumer. 15 U.S.C. § 1681a(k)(1)(B)(i).

The FCRA is not concerned about comparisons of a consumer's rate with that of the hypothetical consumer who gets the best coverage at the lowest possible rate. Thus, if a consumer receives the same rate that she would have received if her consumer report information had not been considered (or, of course, a better rate), an adverse action has not occurred within the meaning of the statutory provision. That is because the consumer report information did not result in an increase in the charge for the insurance coverage for that consumer.

The court of appeals disregarded critical aspects of the FCRA's text and structure when it attempted to shoehorn into the "adverse action" insurance definition all rates other than the best coverage at the lowest rate. First, the FCRA, as amended in 2003, requires that consumer reporting agencies provide consumers with a free consumer report once each year upon request. *See* 15 U.S.C. § 1681j(a)(1)(A). But under the Ninth Circuit's view, such a provision would have been nearly meaningless because all insurance consumers except those with the very best coverage with the lowest rates already would be receiving such reports with annual renewals under 15 U.S.C. § 1681j(c), which provides that each adverse action entitles the consumer to a free consumer report from the consumer reporting agency.

Second, the Ninth Circuit ignored Congress's amendment of the FCRA in 2003 to require an alternate risk-based pricing notice in the credit area, but not the insurance area, in certain instances when a business provides a consumer with credit on "terms that are materially less favorable." 15 U.S.C. § 1681m(h)(1), (5). Congress did not treat that issue as involving an "adverse action." The Ninth Circuit's interpretation below of the term "adverse action," however, would impose on the insurance

industry such a risk-based pricing notice as a matter of judicial fiat.

B. Only a small number of consumers receive the "best" rate for insurance when the rate is based in part on information in consumer reports. The Ninth Circuit ruling thus would result in the issuance of tens of millions of pointless notices to consumers each year who receive good rates based on good consumer reports but do not receive the absolute best coverage at the lowest possible rate. That deluge of additional notices would not only burden significantly insurance companies, but it also would provide consumers with little, if any, appreciable benefit. Such a volume of notices could, in fact, harm consumers by overloading them with information and numbing them to important notices.

ARGUMENT

I. THE FCRA DEMANDS A SHOWING THAT A DEFENDANT SPECIFICALLY INTENDED TO VIOLATE THE STATUTE IN ORDER TO ESTABLISH THAT IT "WILLFULLY" DID SO AND IS THEREFORE SUBJECT TO PUNITIVE AND STATUTORY DAMAGES

In order for a plaintiff to recover punitive damages (which are not capped) and statutory damages (of at least $100 and up to $1,000 per consumer) for violating the FCRA, the plaintiff must establish that the defendant "willfully" failed to comply with the relevant FCRA requirement. 15 U.S.C. § 1681n(a). In the context of the FCRA, "willfully" must be interpreted to require proof that a defendant specifically intended to violate a known legal duty under the FCRA in order to recover punitive or statutory damages. *See, e.g.*, *United States v. Pomponio*, 429 U.S. 10, 12 (1976) ("willfulness in this context simply means a voluntary, intentional violation of a known legal duty").

The Ninth Circuit's misreading of the term "willfully" to include mere recklessness (Pet. App. 128a-129a) is erroneous.[2] Three contextual features of the FCRA are particularly significant in reaching this result: the penal nature of the remedies under the FCRA that are triggered by a "willfully" showing; the need to construe the FCRA's damages provision to avoid doubt about its constitutionality; and the unduly harsh consequences of the Ninth Circuit's lesser standard, particularly in class actions.

A. The Rule Of Lenity Requires That The FCRA's "Willfully" Requirement Be Met By A Showing Of Specific Intent Because It Triggers Imposition Of Punitive And Statutory Damages, And Supports Criminal Sanctions Elsewhere In The Statute

1. The FCRA is a technical statute that, even decades after its enactment, is still the subject of much uncertainty on the part of businesses who must comply with its varied notice requirements. This fact is reflected in Congress's three-tiered approach to liability for damages.

When a defendant violates the FCRA, but does not do so willfully or even negligently, Congress did not authorize any private plaintiff enforcement. *See Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 417 (4th Cir. 2001) ("FCRA does not impose strict liability"). Congress thereby recognized that those subject to the FCRA could reasonably, *i.e.*, non-negligently, engage in conduct that violates the FCRA and that no damages should be awarded in such instances, regardless of the injuries incurred by the plaintiff.

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[2] References to "Pet. App." are to the Petition Appendix filed by petitioners in No. 06-84.

At the same time, the FCRA ensures that actual damages are available to an individual who has been injured as a result of a *negligent* violation of certain of the FCRA's requirements. 15 U.S.C. § 1681o(a)(1).

Congress set the bar much higher for recovery of money damages in excess of actual damages caused by the FCRA violation. A finding that a defendant "willfully" violated the FCRA is required to allow an award of punitive or statutory damages in suits for all violations of FCRA that can be privately enforced. 15 U.S.C. § 1681n(a). It also is a necessary finding to trigger criminal conviction elsewhere in the statute. *Id.* § 1681q (sentence of up to two years imprisonment for knowingly and willfully obtaining consumer reporting agency information under false pretenses); *id.* § 1681r (sentence of up to two years imprisonment for consumer reporting agency's employee knowingly and willfully providing information to unauthorized recipient).

2. The term "willfully" is, of course, "a word of many meanings," and the correct interpretation of the term "is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998) (quoting in part *Spies v. United States*, 317 U.S. 492, 497 (1943)). *See* Br. in Opp. 18 (acknowledging relevance of context). The ambiguity of the term "willfully" in the context of the FCRA means that it must be read narrowly not to trigger punishment in order to comply with the rule of lenity. *See Ratzlaf v. United States*, 510 U.S. 135, 148 (1994) ("were we to find [the statute's] 'willfulness' requirement ambiguous * * * , we would resolve any doubt in favor of the defendant"). When Congress uses the term "willfully" in "highly technical statutes" like the FCRA that present "the danger of ensnaring individuals engaged in apparently innocent conduct," a plaintiff must show that the defendant acted with specific intent, knowing "that his conduct was unlawful" in order to hold it liable. *Bryan v. United States*, 524 U.S. at 194-195.

The rule of lenity is not limited to criminal sanctions but applies to statutes in which the civil remedies can be described as "penal." *See* 3 Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 59.1, at 114-116 (6th ed. 2001). In *Steam-Engine Co. v. Hubbard*, 101 U.S. 188 (1879), for example, a statute required that a corporate president file an annual report and provided that if he "intentionally neglects or refuses to comply with that requirement," he would be personally liable for any debts incurred by the corporation contracted during the period of neglect or refusal. *Id.* at 189. This Court held that the private civil action for damages created by the statute "should be strictly construed" because the statute "is penal." *Id.* at 191.

The rule of lenity applies to statutes that authorize punitive damages because those damages are widely recognized to be penal. *See Sutherland*, *supra*, § 59.2, at 119, 121 ("provisions for exemplary damages" are "penal" because "their effects are punitive"). Punitive damages "serve the same purposes as criminal penalties," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at 417, and "have been described as 'quasi-criminal,'" *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citation omitted). "[B]y definition [they] are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981).

Statutory damages that allow an award of monetary damages against a defendant without regard to the existence or amount of actual injuries sustained by a plaintiff also call for application of the rule of lenity. Such statutes are penal because they "compel obedience beyond mere redress to an individual for injuries received." *Sutherland*, *supra*, § 59.1, at 116. Courts traditionally have held that a civil action providing for such statutory

damages is penal, and thus must be strictly construed. *See* 23 *American & English Encyclopaedia of Law* 378-379 (1st ed. 1893) (rule of strict construction "applies not only to statutes relating to criminal offenses, but also to all statutes which impose, as punishment, any penalties, pecuniary or otherwise, * * * or provide for the recovery of damages beyond just compensation to the party injured, whether such penalties, forfeitures, or damages are to be enforced and recovered at the suit of the state or of a private individual."); *Marshall v. Wabash Ry. Co.*, 46 F. 269, 270-271 (C.C.S.D. Oh. 1891) ("where the plaintiff is not required to offer any evidence proving damages, and the defendant is not permitted to offer any evidence disproving damages, and the recovery is to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely, and not penal"); *Wood, Walker & Co. v. Evans*, 461 F.2d 852, 855 (10th Cir. 1972) (statutes where "the amount of the damages is fixed on a somewhat liquidated measure without regard to injury suffered" are "strictly construed"). "By this is meant no more than * * * when there is reasonable doubt as to [a word's] true meaning, the Court will not give them such interpretation as to impose the penalty." *Hines & Battle v. Wilmington & W. Ry. Co.*, 95 N.C. 434, 437 (1886).

In *Brown v. Kildea*, 58 Wash. 184 (1910), the court was faced with statutory damages akin to those at issue here. The court held that a statute authorizing a private cause of action against a corporate official for a statutory damage award of not less than $100 nor more than $1,000 should be "strictly construed" because it "subjects one person to the payment of a sum of money to another, without reference to any actual injury and without requiring him either to allege or prove an actual injury." *Id.* at 186-187; *see also Cleveland, C. C. & S. L. Ry. Co. v. Wells*, 62 N.E. 332, 334 (Ohio 1901) ("the right to recover not less than one hundred and fifty dollars, although

double the amount of overcharge might not be one dollar, and the right to recover exemplary damages, are severely penal privileges" and thus those provisions "are to be strictly construed"); *Hines*, 95 N.C. at 438 (same for statute authorizing private suit to recover statutory damages of $200 for discriminatory rates). Here, of course, the statutory damages provision of the FCRA allows damages "of not less than $100 and not more than $1,000" regardless of any injury sustained by the plaintiffs and respondents seek such damages for each class action consumer. 15 U.S.C. § 1681n(a)(1)(A).

The application of the rule of lenity to determine the meaning of "willfully" in the FCRA is particularly apposite because the FCRA's felony provisions require the government to prove that a person acted "willfully" in order to establish criminal liability. *See* 15 U.S.C. §§ 1681q, 1681r. The fact that the criminal provisions are not applicable in this particular case is irrelevant. There is nothing in the FCRA that suggests, much less demonstrates, that Congress intended the same word to have different meanings in different portions of the same statute. *See Ratzlaf*, 510 U.S. at 143 ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); *see also Crandon v. United States*, 494 U.S. 152, 168 (1990) (applying the rule of lenity in a civil action premised on a criminal statute).

3. Respondents' attempt to seek refuge in employment law cases that interpret "willful" to mean reckless must be rejected. *See* Br. in Opp. 14 (citing, *inter alia*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). Under the Age Discrimination in Employment Act (ADEA) provision at issue in *Thurston* and *Hazen Paper*, a finding of willfulness permitted a court to award an amount equal to the amount of lost wages as liquidated damages, but this Court has expressly held that such a

double damages remedy is "compensation, not a penalty or punishment" and serves as remuneration for "damages too obscure and difficult of proof." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-584 (1942) (interpreting similar provision in Fair Labor Standards Act). That remedy also has been viewed as a substitute for prejudgment interest, which is not otherwise available under the ADEA. *See Powers v. Grinnell Corp.*, 915 F.2d 34, 39-41 (1st Cir. 1990) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-716 (1945)). Thus, there was no cause for the Court to apply the rule of lenity in those cases.[3]

Likewise, the third employment case did not involve either uncapped punitive damages or statutory damages without proof of actual injury and thus did not implicate the rule of lenity. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (willfulness finding based on a recklessness standard extended the statute of limitations for bringing suit from two years to three years).

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[3] The Court's indication in *Thurston* that the double back-pay provision was "punitive in nature," 469 U.S. at 125, relied on the statement of a Senate sponsor of the ADEA, but that legislative statement was that the double back-pay provision would "furnish an effective deterrent to willful violations," *Ibid.* (quoting 113 Cong. Rec. 2199 (1967) (Sen. Javitts)), and remedial provisions can provide effective deterrence so that statement does not necessarily support the Court's *dictum*. Additional legislative history concluded that the provision was not punitive. *See* H. Conf. Rep. No. 95-950, at 13-14 (1978) (explaining that the "ADEA as amended by this act does not provide remedies of a punitive nature" and quoting *Missel*, 316 U.S. at 583-584).

B. A Specific Intent Standard Avoids The Substantial Constitutional Doubt Raised By A Lesser Standard

A federal statute must be read to avoid doubt about its constitutionality. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005).[4]

This constitutional avoidance doctrine supports interpretation of the term "willfully" to require a showing by a plaintiff of a specific intent on the part of the defendant to violate a known FCRA requirement. The contrary interpretation of the term urged by respondents, and adopted by the Ninth Circuit, that establishes a mere recklessness standard raises substantial questions about the constitutionality of any resultant statutory or punitive damages awards because of the Constitution's substantive limits.

This Court's earliest cases involving violation of the Due Process Clause's substantive limit on private

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[4] The Seventh Circuit's recent refusal, in deciding whether a class should be certified, to consider whether subjecting a defendant to "billions of dollars for purely technical violations of the FCRA" could violate the Constitution, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006), conflicts with the reality that defendants confronted with a certified FCRA class seeking billions of dollars in damages cannot reasonably rely on the possibility that constitutional limits will be imposed *after* damages are awarded, as the court there suggested. Such circumstances likely would unfairly induce settlement to avoid potential ruinous liability. In any event, *Murray* does not suggest that constitutional doubt can be ignored in determining the scope of the statute.

monetary awards arose where, as here, a statute fixed a damages award that had no relationship to any actual damages incurred. Thus in *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915), this Court held that a provision authorizing statutory damages of $100 per day for refusing a customer phone service violated due process when the company's action was in good faith, impartially applied, consistent with longstanding practice, and done in the absence of any state ruling that the conduct was unreasonable. Under these circumstances, this Court held that "inflict[ing] upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." *Id.* at 491; *see also Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (statutory damages of $500 for overcharging a customer $3 violated due process because the damages were "grossly out of proportion to the possible actual damages").

Building on those early cases, the Court has held that the Due Process Clause prohibits "grossly excessive or arbitrary" punitive damages awards. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). When dealing with violations of such a technical statute like the FCRA involving reporting of credit, only instances of deliberate lawbreaking could even colorably result in a constitutionally permissible punitive damage award. *Cf. Gore*, 517 U.S. at 576; *see id.* at 580 ("the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists"); *Southwestern Tel. & Tel. Co.*, 238 U.S. at 489-490 (relying on defendant's good faith to find statutory damages unconstitutionally excessive).

Indeed, a prominent factor relevant to the determination of whether a particular award is constitutionally excessive is "the degree of reprehensibility of the defendant's

conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 575). In assessing reprehensibility, a court must consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419.

Violations of the FCRA's requirements occur purely in the economic realm, pose no risk to the health or safety of individuals, and do not target any particularly vulnerable persons. Such violations will thus rarely be sufficiently "reprehensible" to permit any award of punitive damages under the Constitution, under any standard of willfulness. A finding of an unintended, reckless violation of the FCRA, in particular, falls far short of the sort of reprehensible conduct that could support punitive damages. To reduce the likelihood of unconstitutional damage awards, this Court must read the statute to require proof of a particularly culpable state of mind, *i.e.*, at least a specific intent to violate a known legal duty.

The need for reading the FCRA to require a particularly culpable state of mind is even greater in this situation because statutory and punitive damage awards under the FCRA will generally fail to comply with another significant measure of the constitutionality of such damages: the ratio of those damages to actual damages. *State Farm*, 538 U.S. at 425. The ratio is extremely large in virtually all FCRA cases because the actual damages to individuals in such cases, especially those involving failure to provide notice such as here, is almost always quite low. This is true even when, as in these cases, plaintiffs seek only statutory damages. In the cases now before the Court, the actual damages likely would be $0 because receiving the notice would not have altered the results, yet

respondents seek $1,000 damages for each of an unquantified number of individuals in the putative class. The only way such damages could survive a constitutional challenge, if at all, is if the plaintiffs are required to prove that defendants possessed the specific intent to violate a known legal duty under the statute. There certainly is no evidence that Congress intended to authorize such damages, unrelated to actual harm, based merely on unintended, reckless violations. In the absence of "firm evidence" to the contrary, it should not be assumed that "Congress intended to press ahead into dangerous constitutional thickets" and the term "willfully" thus should be read in a manner that avoids, or at least reduces, such potentially unconstitutional results. *Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989).

C. Awards Of Uncapped Punitive Damages And Statutory Damages Based On Mere Recklessness Would Result In FCRA Class Actions For Billions Of Dollars Not Based On Actual Harm

A significant litigation risk to defendants sued under the FCRA is caused by the aggregation in class actions of individual claims totaling hundreds of millions (if not billions) of dollars in statutory or punitive damages.

Respondents' complaints in the two actions under review are typical of FCRA cases that plaintiffs seek to litigate as class actions. Plaintiffs made no claim that petitioners' actions were negligent or that the named plaintiffs personally suffered any actual damages. Instead, their complaints, at the time they were dismissed by the district court, alleged only willful misconduct and sought statutory and punitive damages on behalf of a class. On remand from the Ninth Circuit, plaintiffs amended their complaints to strike their claims for punitive damages, and now seek $1,000 statutory damages for each member

of the putative class. The allegations in the two other FCRA cases in which *certiorari* petitions are pending likewise seek only non-compensatory damages for the putative classes and do not bother to allege any actual harm sustained by the named plaintiffs.

Such allegations of willful FCRA violations based on a mere recklessness standard may increase even more the risk of enormous damage recoveries. There is a greater likelihood that such a case will be brought and certified as a damages class action under Federal Rule of Civil Procedure 23(b)(3). That is because courts hold that the FCRA permits plaintiffs in a class to avoid the need to establish any actual damages if they allege the defendant willfully violated the FCRA. *See, e.g., In re Progressive Ins. Corp. Underwriting and Rating Practices Litigation*, No. 1:03-cv-01519-MP-AK, slip op. (N.D. Fla. June 23, 2006) (certifying a FCRA class, for settlement purposes, of "several million" consumers); *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450 (W.D. Okla. Apr. 13, 2006) (certifying FCRA class of over one million insureds); *Cavin v. Home Loan Ctr., Inc.*, 236 F.R.D. 387 (N.D. Ill. 2006) (FCRA class of approximately 49,000 members). A recklessness standard for willfulness, such as that adopted by the Ninth Circuit, makes it easier for plaintiffs' counsel to make such an allegation consistent with Federal Rule of Civil Procedure 11.

At the same time, the Ninth Circuit's mere recklessness standard for willful violations adversely affects the ability of a defendant to estimate accurately the risk of litigation. A business that determines it can prove that it acted in good faith (*i.e.*, non-willfully), and thus would be willing to litigate to conclusion a case making allegations of willfulness, would be under increased pressure to settle a case that relies on some amorphous standard of recklessness to determine the plaintiffs' eligibility for potentially significant punitive and statutory damages unrelated to any actual harm.

Under a recklessness standard, such a class action "create[s] a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements." *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003); *see* Fed. R. Civ. P. 23 advisory committee's note (1998 Amendments) (money class actions may force many defendants "to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.) (noting that "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements' "), *cert. denied*, 516 U.S. 867 (1995).

The driving force for such class actions is not compensation for individual harm, but professional plaintiffs and attorneys intent on extracting monetary damages from companies (and their shareholders) for themselves and a class of uninjured consumers. The defendant companies, however, provide valuable services and may have engaged in unintended technical violations of a complex regulatory statute. One example of this phenomenon is Mr. and Mrs. Murray, who have sought to be class representatives in dozens of FCRA class actions and, as one district court noted, "greet the arrival of what most people would consider junk mail (*i.e.*, unsolicited offers of credit) with joy and eagerly show their mail to lawyers * * * pursuant to a pre-existing agreement in the hope of finding an offer that presents a colorable FCRA claim." *Murray v. Cingular Wireless II, LLC*, 2005 U.S. Dist. LEXIS 39542, at *7-*8 (N.D. Ill. Dec. 22, 2005); *see also Murray v. Cingular Wireless II, LLC*, 2005 U.S. Dist. LEXIS 39561, at *1-*2 (N.D. Ill. Nov. 2, 2005). The "willfully" requirement should not be read as respondents would have it, to make it easier for the Murrays and their lawyers to obtain class certification and obtain a windfall

of non-compensatory damages from a broad range of American businesses.

Counsel who bring such actions are well aware that such allegations increase substantially the pressure for settlement regardless of the merits of the case. In a case described by respondents as involving an "identical" claim (Br. in Opp. 7 n.2), insurance companies settled a class action suit for $280 per person in statutory damages for a class of more than 67,000 members. That settlement totaled nearly $20 million in damages without any proof of actual damages sustained by a class member. *See Razilov v. Nationwide Mut. Ins. Co.*, No. CV 01-1466 BR (D. Or. July 6, 2006) (Stipulation of Settlement). Of that settlement, plaintiffs' counsel has requested nearly $6 million in fees. *Razilov v. Nationwide Mut. Ins. Co.*, No. CV 01-1466 BR (D. Or. Oct. 20, 2006) (Fee Petition).

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE FCRA'S "ADVERSE ACTION" INSURANCE PROVISION IS CONTRARY TO THE STATUTORY TEXT AND STRUCTURE AND WOULD HAVE A SUBSTANTIAL NEGATIVE EFFECT ON THE CONDUCT OF AMERICAN BUSINESSES

The FCRA defines the term "adverse action" for purposes of its insurance provisions as "a denial or cancellation of, *an increase in any charge for*, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). *See also* page 26, *infra* (discussing other definitions of "adverse action" in the FCRA). The FCRA requires that an insurance company notify a consumer of such an action taken in connection with an underwriting decision when it is based in part on a consumer report obtained under 15

U.S.C. § 1681b(a)(3)(C) in connection with the underwriting. *See id.* § 1681m(a)(1).

The Ninth Circuit held that the phrase "an increase in any charge" in Section 1681a(k)(1)(B)(i) includes the purchase of insurance where the consumer is charged a rate that is higher than what the consumer would have been charged if his score had been the "top potential score" based on information from his consumer report. Pet. App. 118a. That interpretation would mean that an adverse action occurs whenever a "consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable." *Ibid.* The ruling thus applies to issuance of any insurance coverage that is not the best insurance coverage at the lowest possible rate.

A. The FCRA's Text And Statutory Structure Demonstrate That The "Adverse Action" Insurance Provision Does Not Extend To Every Insurance Customer Who Does Not Receive The Best Coverage At The Lowest Possible Rate

1. The plain language of the FCRA insurance provision specifies that an adverse action occurs only if the information from a consumer report is used, in whole or in part, to "increase [the] charge for" insurance coverage for that consumer. 15 U.S.C. § 1681a(k)(1)(B)(i). The provision is intended to ensure that an insurer gives notice to a consumer when it charges a consumer an increased rate because of credit information in a consumer report.

The FCRA is not concerned about comparisons of a consumer's rate with that of the hypothetical consumer who gets the best coverage at the lowest possible rate. Thus, if a consumer receives the same rate that she would have received if her consumer report information had not been considered (or, of course, a better rate), an adverse action has not occurred within the meaning of the

statutory provision. That is because the consumer report information did not result in an increase in the charge for the insurance coverage for that consumer.

The facts of one of the other FCRA cases currently pending before the Court demonstrate that the Ninth Circuit's contrary interpretation would expand the meaning of the statutory text. In *State Farm Mutual Automobile Insurance Co. v. Willes*, No. 06-101, the plaintiff was quoted a price for insurance before she formally applied for automobile insurance. The quote was based only on background information she provided including, for example, the fact that she had received a speeding ticket within the preceding thirty-six months. *See State Farm* Pet. 3. After the plaintiff submitted her formal insurance application, the insurer reviewed her credit history in the consumer report as part of its underwriting process but ultimately issued her insurance policies "at the rates that had been quoted to her without reference to any credit information or other consumer report" information. *Id.* at 3-4. Despite evidence that conclusively demonstrated that the plaintiff received the *same* rate that she would have received if her consumer report information had not been considered, the Ninth Circuit held that the plaintiff had been subjected to an adverse action because she did not get a lower rate.

2. The Ninth Circuit disregarded critical aspects of the FCRA's structure when it attempted to shoehorn into the "adverse action" definition any consideration by a company of a consumer report that does not give a consumer the best possible coverage at the lowest possible rate, regardless of whether consideration of the report made the consumer worse off than if no consideration had been given to the consumer report.

First, each adverse action notice entitles the recipient to a free consumer report from the consumer reporting agency. *See* 15 U.S.C. § 1681j(c). If Congress had intended the FCRA adverse action insurance provision to generate

free consumer reports to nearly all consumers, Congress would not have amended the FCRA in 2003 to require that consumer reporting agencies provide consumers with a free consumer report once each year upon request, *see id.* § 1681j(a)(1)(A), because all insurance consumers except those with the very best coverage with the lowest rates already would be receiving such reports with annual renewals under 15 U.S.C. § 1681j(c), which provides that each adverse action entitles the consumer to a free consumer report from the consumer reporting agency.

Second, the Ninth Circuit ignored Congress's addition in 2003 of certain provisions to govern risk-based pricing of credit, but not of insurance, when a business provides a consumer with credit on "terms that are materially less favorable." 15 U.S.C. § 1681m(h)(1). Section 1681m(h) requires that federal agencies issue regulations to require a business that extends credit to provide an alternate risk-based pricing notice in certain instances.

Congress added the provisions in response to the growing use of consumer reports to determine the terms of the credit extended, and not just whether to extend credit. The FTC informed Congress in hearings preceding the 2003 amendments that extenders of credit "increasingly are using consumer reports to undertake risk-based pricing of products or services. Many creditors * * * no longer merely approve or deny applications, but, rather, they use credit report data to finely calibrate the terms of their offer." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong., 6 (2003) (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n).

Congress was also told that the existing definition of "adverse action" for the FCRA's credit provisions was not triggered by such risk-based pricing because the FCRA specifies that, in the credit context, the term "adverse action" "has the same meaning as in" the Equal Credit Opportunity Act (ECOA). 15 U.S.C. § 1681a(k)(1)(A).[5] The

[5] The FCRA includes different definitions of the term "adverse action" in the different contexts of insurance, credit, employment, government license and benefits transactions, and a "miscellaneous" definition. *See* 15 U.S.C. § 1681a(k). The so-called miscellaneous definition provides that an adverse action is an action that is "made in connection with an application * * * made by, or a transaction * * * initiated by, any consumer" and is "adverse to the interests of the consumer." 15 U.S.C. § 1681a(k)(1)(B)(iv). Congress did not intend the FCRA's "miscellaneous" definition to apply to transactions governed by another "adverse action" definition. The transaction-specific structure of the FCRA adverse action definitions demonstrates that the "miscellaneous" definition was intended to ensure that if a person has a permissible purpose to obtain a consumer report for a non-credit, non-insurance, non-employment, non-license or non-benefit transaction and the person uses such report as the basis for an action adverse to the consumer's interest, the person would be required to provide the consumer with an adverse action notice. The legislative history confirms that Congress intended the miscellaneous definition to apply only when the transaction did not fall within another definition. *See Senate Hearings, supra*, at 53 & n.46 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n); S. Rep. No. 104-185, at 31-32 (1995); H.R. Rep. No. 103-486, at 26 (1994) (explaining that earlier proposed version of the "miscellaneous" definition was intended to cover "a refusal to cash a check, lease real estate, or open a new transaction account based on a consumer report").

The Seventh Circuit, in a conclusory opinion that finds no basis in the statute, erroneously held that the "miscellaneous" definition can apply to credit transactions. *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 982 (7th Cir. 2004). That decision is wrong and, if followed, could significantly expand the effect of the "adverse action" holding because the Ninth Circuit's interpretation here could similarly expand the "miscellaneous" definition. Moreover, if the "miscellaneous" definition applied to credit transactions, the "credit" definition would be rendered superfluous because it would be subsumed by the broader "miscellaneous" definition – a result that Congress could not have intended.

ECOA defines "adverse action" to mean "a denial or revocation of credit," 15 U.S.C. § 1691(d)(6), and its implementing regulations make clear that if a consumer applies for credit at a specific rate but the lender makes a counteroffer at a different rate, there is no adverse action if the consumer accepts the lender's counteroffer. *See* 12 C.F.R. § 202.2(c); *Senate Hearings*, *supra*, at 53 n.46 (statement of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) (consumers "often receive a counter-offer at a higher price. Under the law, if the consumer accepts that counter-offer, there is no adverse action because the FCRA definition [of adverse action for credit] is coupled to the definition under the [ECOA]."). Courts have relied on these implementing regulations to conclude that "a denial of credit coupled with a counteroffer that is accepted by the applicant does not trigger the FCRA's [adverse action] notice requirement because the applicant has suffered no 'adverse action.'" *Harper v. Lindsay Chevrolet Oldsmobile, LLC*, 212 F. Supp. 2d 582, 591 (E.D. Va. 2002).

The Ninth Circuit, through its interpretation of the term "adverse action," has imposed on the insurance industry its own risk-based pricing disclosure requirement. The details of what terms are material will, apparently, be determined through case-by-case adjudication. It is clear that Congress did not intend such a requirement for insurance, however, because it could have easily extended the amendment to apply the risk-based pricing provision that it created in the credit context to such insurance transactions as well, but did not do so.

B. The Ninth Circuit's Ruling Would Require The Issuance Of Millions Of Useless Notices To American Consumers

The Ninth Circuit's interpretation of "adverse action" in this case would force insurance companies, and possibly other persons subject to the FCRA, to issue tens of millions of pointless notices to consumers each year.[6]

Only a small number of consumers receive the best insurance coverage at the lowest possible rate when the rates are based in part on credit information from consumer reports. At many insurance companies that rely in part on such information to set rates, fewer than 15% of insureds receive the best rate available. *See* Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance*, Apps. C & D (2002). But the Ninth Circuit's holding would require insurance companies to provide adverse action notices to nearly all consumers who purchase insurance, *i.e.*, all but the small group who have the best scores and receive the best coverage and rates. Because the majority of consumers nationwide must

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[6] The Ninth Circuit appears to have found that when a consumer is charged an increased rate for insurance and no adverse action notice is provided, the party that makes "the decision as to which of the" affiliated insurance companies will issue the policy will be subject to liability along with the company that issues the policy. Pet. App. 125a. That holding, which finds no statutory basis in the FCRA, could possibly make a bank liable under 15 U.S.C. § 1681s(b), along with a mortgage insurance company, if it selects which mortgage insurance company to underwrite a policy and the rate charged for the mortgage insurance is not the "best" rate and the bank fails to provide an adverse action notice. Similarly, if a consumer wishes to obtain credit-life or credit-disability insurance to protect against default on a credit product obtained from a bank and the bank, based in part on consumer report information, selects the insurance company that will receive the consumer's insurance application, the bank might face liability under 15 U.S.C. § 1681s(b) in the Ninth Circuit if the rate charged for the insurance is not the "best" rate and no adverse action notice is provided.

obtain automobile and/or homeowner's insurance, the Ninth Circuit's holding will require insurance companies to produce and send tens or hundreds of millions of additional adverse action notices each year.

Congress could not have intended such an absurd result. To the contrary, the Federal Trade Commission cautioned Congress to this effect when Congress was addressing revisions to the FCRA. It explained that it was important "to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate." *Senate Hearings*, *supra*, at 529 (testimony of Joel Winston, Associate Director, Financial Practices Division, Bureau of Consumer Protection, Federal Trade Comm'n).

The deluge of additional notices would provide consumers with little, if any, appreciable benefit and might, in fact, harm consumers by overloading them with information and numbing them to important notices. For example, the notices may confuse or mislead consumers who receive insurance at favorable rates because of their good credit histories, but not at the "best" rates. In addition, as more adverse action notices are provided, there is a real risk that the effectiveness of the notices intended by Congress will be diluted substantially. Consumers may begin to treat the notices as boilerplate disclosures that should be ignored. *See Senate Hearings*, *supra*, at 95-96 (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n) ("[I]f you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore."); *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (discussing problem of "informational overload"). The flood of additional notices will undercut their statutorily intended function to focus consumers on potential material inaccuracies in their consumer reports.

Typical consumers with good credit histories who obtain insurance at a favorable rate but receive adverse action notices, would spend unnecessary time examining consumer reports for material inaccuracies that do not exist.

CONCLUSION

For the reasons set forth above, the judgments of the Ninth Circuit should be reversed.

Respectfully submitted,

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NOVEMBER 13, 2006

632B

Nos. 06-84, 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *ET AL.*,
Petitioners,

v.

CHARLES BURR, *ET AL.*,
Respondents.

GEICO GENERAL INSURANCE COMPANY, *ET AL.*,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF FORD MOTOR COMPANY IN SUPPORT OF PETITIONERS

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF FORD MOTOR COMPANY IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

Ford Motor Company ("Ford") assembles and distributes

[1] Pursuant to this Court's Rule 37(a), blanket letters of consent from the parties were filed with the Clerk on September 28, 2006 and September 29, 2006. Pursuant to Rule 37.6, Ford states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than Ford made a monetary contribution to the preparation or submission of this brief.

motor vehicles nationwide. One of Ford's wholly-owned subsidiaries, Ford Motor Credit Company ("Ford Credit"), offers a wide variety of automotive financing products to and through automotive dealers nationwide. As a provider of financing products, Ford Credit is subject to litigation based on the occasionally ambiguous terms of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), and has a direct interest in ensuring that it is not subject to statutory or punitive damages for good faith, objectively reasonable interpretations of the provisions of that act. *See, e.g., Carter* v. *Atchley Ford, Inc.*, No. 8:01CV151, 2002 WL 802682 (D. Neb. 2002) (seeking punitive damages under FCRA).

Ford and Ford Credit are also routinely subject to other litigation under state and federal law in which the plaintiff seeks statutory or punitive damages on the basis that they have allegedly acted in conscious or reckless disregard of the plaintiffs' rights, the same standard that the Ninth Circuit adopted in this case for awarding statutory and punitive damages under FCRA. *See, e.g., Buell-Wilson* v. *Ford Motor Co.*, 141 Cal. App. 4th 525 (2006) (punitive damages sought for "conscious disregard" of safety in designing motor vehicle); *In re Ratliff*, 318 B.R. 579, 583 (Bankr. E.D. Okla. 2004) (punitive damages sought for repossessing secured vehicle in "reckless disregard" of federally protected right to automatic bankruptcy stay). In many of these cases, punitive damages are sought, and occasionally awarded, even though Ford or Ford Credit's conduct was objectively reasonable, *i.e.*, reasonable people could conclude that their conduct was lawful. In *Buell-Wilson*, for example, the California courts have upheld an award of punitive damages against Ford based on alleged stability defects in the Ford Explorer even though the National Highway Traffic Safety Administration has repeatedly considered and rejected the theories asserted by the plaintiffs, and even though, prior to the *Buell-Wilson* trial, Ford had never lost an Explorer

rollover case at trial and at least 11 other juries had returned defense verdicts in such cases.

As explained below, due process precludes punishment for objectively reasonable conduct that reasonable people could conclude was lawful. For this reason, it should preclude punishment in this case for an interpretation of FCRA that the district court found was correct or that has been endorsed by the Federal Trade Commission. Ford has a substantial interest in ensuring that this Court's decision takes account of the constitutional limitations that apply, not just in this case, but in all other cases in which punitive damages are sought.

SUMMARY OF ARGUMENT

As the petitions explain, the Ninth Circuit interpreted the term "willful" as used in 15 U.S.C. § 1681n to permit the imposition of punitive damages based solely on "negligence, gross negligence, or a complete good faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law." Geico Pet. *i.; see also* Safeco Pet. 2. So understood, the Ninth Circuit's opinion would permit punitive damages to be awarded under circumstances in which reasonable people could conclude—indeed, like the district court and the Federal Trade Commission, *have* concluded—that the defendant's interpretation of its obligations under FCRA was correct.

Such an interpretation of the statute raises serious due process concerns by permitting jury-imposed punishment without providing fair notice to defendants of what they were required to do to avoid such punishment. At least a century's worth of precedent establishes that a statute is unconstitutionally vague if applied to punish—civilly or criminally—conduct that is "objectively reasonable," *i.e.*, conduct that reasonable people could conclude was lawful.

In *Screws* v. *United States*, 325 U.S. 91 (1945), this Court confronted the same constitutional issue and interpreted the same word, "willful," in a way that precluded punishment for conduct that was objectively reasonable. To avoid the constitutional problem in this case, this Court should interpret "willful" in the same way and require proof that the defendant knew it was violating a provision of FCRA that was sufficiently definite that its meaning at the time of the defendant's conduct was not subject to reasonable debate.

ARGUMENT

IF APPLIED TO PUNISH OBJECTIVELY REASONABLE CONDUCT, § 1681n WOULD VIOLATE THE FAIR NOTICE REQUIREMENTS OF DUE PROCESS

As Petitioners argue, the Ninth Circuit interpreted the term "willful" in 15 U.S.C. § 1681n to permit the imposition of punitive damages based solely on "negligence, gross negligence, or a completely good faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law." Geico Pet. *i.*; *see also* Safeco Pet. 2. That interpretation would render the statute unconstitutionally vague under the Due Process Clause of the Fifth Amendment. The Court should avoid that constitutional problem by adopting an interpretation of willful that precludes punishment for objectively reasonable conduct, just as it did in *Screws* v. *United States*, 325 U.S. 91 (1945).

1. This Court has repeatedly held that vagueness in a criminal or quasi-criminal statute violates due process if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999); *accord, e.g., Hill* v. *Colorado*, 530 U.S. 703, 732 (2000). "[B]ecause we assume that man is free to steer between lawful and unlawful

conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *accord*, *Morales*, 527 U.S. at 56 (fair notice principle serves the purpose of "provid[ing] the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits"). Punishment therefore may not be predicated on a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997).

This Court has never limited vagueness doctrine to criminal penalties; on the contrary, it has consistently applied the doctrine to civil statutes that are punitive in nature. *See, e.g., Village of Hoffman Estates* v. *Flipside*, 455 U.S. 489, 499 (1982) (employing strict vagueness scrutiny for statute that imposed quasi-criminal penalties); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966) ("[T]his state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"); *Champlin Ref. Co.* v. *Corp. Comm'n*, 286 U.S. 210, 241 (1932) (holding penalty statute unconstitutionally vague where it was designed not to remedy a violation but "to inflict punishment."); *A.B. Small Co.* v. *American Sugar Ref. Co.*, 267 U.S. 233 (1925) (holding statute unconstitutionally vague in civil case); *Sw. Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482 (1915)($6,300 civil penalty violated due process). Nor is the doctrine limited to statutory civil punishments. Indeed, with specific reference to punitive damages, this Court recently observed that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003) (quoting *BMW of N. Am.* v. *Gore*, 517

U.S. 559, 574 (1996)).[2]

2. In *Lanier*, this Court expressly recognized that the due process vagueness standard, which protects all citizens from punishment based on vaguely defined offenses, is functionally identical to the qualified immunity standard, which protects public officials from civil liability based on legal obligations that are not "clearly established." 520 U.S. at 270-71. As the Court observed, the qualified immunity test for public officers is "simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* And this Court's opinions establish beyond any doubt that officials are entitled to qualified immunity as long as their conduct is "objectively reasonable"—*i.e.*, as long as reasonable officials could conclude that the conduct at issue was lawful. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (immunity available if officers act in "objectively reasonable manner"; "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [the conduct was lawful"); *accord, e.g., Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (under "settled law," officers are entitled to immunity "if a reasonable officer could have believed" that his or her conduct was lawful); *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987) ("The

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[2] The "actual damages" allowed by 15 U.S.C. § 1681n(a)(1)(A)—a minimum of $100 regardless of actual losses—are unrelated to the amount of any actual damages suffered by a plaintiff. Thus, as noted by *amici* Farmers Insurance Co., these statutory damages are punitive in nature and subject to the same constitutional limitations as punitive damages. *Amicus* Br. of Farmers Ins. Co. of Or., *et al.*, at 12-13 n.7, citing *United States* v. *Halper*, 490 U.S. 435, 448 (1989), *overruled on other grounds by Hudson* v. *United States*, 522 U.S. 93 (1997), and *Fitzgerald Publ'g Co.* v. *Baylor Publ'g Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986).

relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's [conduct] to be lawful."). Accordingly, "if officers of reasonable competence could disagree on [the matter at] issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

3. At least a century of precedent supports this Court's conclusion in *Lanier* that the due process vagueness standard likewise precludes punishment where reasonable people acting in good faith can disagree on whether the conduct is lawful. In *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, 592 (1910), for example, a statute required every street railroad company to give passage to all persons desirous of using the railway cars "without crowding said cars." The defendant railroad company was charged with overcrowding its cars. Stating that "the dividing line between what is lawful and unlawful cannot be left to conjecture," the court held that the statutory prohibition of "crowded" railway cars was too indefinite and uncertain to support an indictment. *Id.* at 594.

> What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. What may be regarded as grounds for acquittal by one court may be held sufficient to sustain a conviction in another. The principle of uniformity, one of the fundamental elements essential in determining the validity of criminal statutes, is wholly lacking.

Id. at 596.[3]

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[3] Even before this Court began to address vagueness issues, lower courts had reached a consensus that statutes could not constitutionally be applied to impose quasi-criminal punishment where reasonable people could reach different conclusions about whether the conduct was

Sixteen years later, in *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926), this Court adopted the *Capital Traction* language as its own. The Oklahoma statute at issue in *Connally* imposed a fine and potential imprisonment for certain employers who failed to pay employees at least "'the current rate of per diem wages in the locality where the work is performed.'" 269 U.S. at 388. Quoting from *Capital Traction*, this Court observed that the "dividing line between what is lawful and unlawful cannot be left to conjecture," that a penal statute "must be so clearly expressed that the ordinary citizen can choose, in advance, what course it is lawful for him to pursue," that a "citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions," and that penal statutes "should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." *Id.* at 393.

It was in this context that this Court in *Connally* adopted the modern standard for evaluating vagueness claims on which it later relied in *Lanier*: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally*, 269 U.S. at 391.

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unlawful. *See, e.g., Louisville & Nashville R.R. Co.* v. *Railroad Comm'n*, 19 F. 679, 691 (C.C.M.D. Tenn. 1884) ("quasi criminal" penalties could not be imposed for charging "unjust" and "unreasonable" rates because one jury might find that the rates charged were unjust or unreasonable, while another jury, on the same facts, might find to the contrary, thereby "making the guilt or innocence of the accused dependent upon the finding of the jury, and not upon a construction of the act."); *Hewitt* v. *State Bd. of Med. Examiners*, 84 P. 39, 41 (Cal. 1906) (revocation of medical license for "grossly improbable statements" unconstitutional because "the members of one board might conclude that it contained 'grossly improbable statements,' while another board might reach an entirely opposite conclusion.").

Noting the ambiguity of both "current rate of wages" and "locality" in the statute, the Court concluded that the statute at issue was unconstitutionally vague because "the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries." *Id.* at 395.

4. Other decisions, both before and after *Connally,* have held statutes unconstitutional where liability depended on the "probably varying impressions" of courts and juries, *i.e.*, when such statutes were applied to punish defendants under circumstances where reasonable people (and, therefore reasonable courts and juries) could disagree about whether their conduct was lawful. *See, e.g. Colautti* v. *Franklin*, 439 U.S. 379, 401 (1979) (punishment improper where "experts can – and do – disagree"); *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U.S. 482 (1915). In *Danaher,* for example, an Arkansas statute required telephone companies to provide service to all applicants, subject to such "reasonable regulations" as the telephone company should establish. The defendant telephone company in *Danaher* had adopted a regulation under which it would not furnish service to patrons in arrears for past service and, further, would not provide to such patrons the discount normally allowed for paying in advance. The Arkansas Supreme Court found that the telephone company's regulation was unreasonable and that it had therefore violated the statute, and it affirmed a penalty of $6,300.

This Court held that the $6,300 penalty "was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." 232 U.S. at 491. The Court held that the penalty violated the "fundamental principles of justice" embraced by the due process clause because the defendant was justified in believing it was

reasonable, even if it was foreseeable that a court *might* hold the regulation unreasonable:

> If it be assumed that the state legislature could have declared such a regulation unreasonable, the fact remains that it did not do so, but left the matter where the company was well justified in regarding the regulation as reasonable and in acting on that belief. * * * Some regulation establishing a mode of inducing prompt payment of the monthly rentals was necessary. * * * The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions.

Id. at 490-91.

5. In short, numerous decisions of this Court over the last century, in several different contexts, all establish the fundamental principle that the "fair notice" required to accord due process prohibits punishment for conduct that reasonable people could conclude was lawful—conduct which, in the qualified immunity cases, the Court has called "objectively reasonable."[4]

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[4] The term "objectively reasonable" is perhaps unfortunate, because it suggests that there is some objective method—apart from the verdict of a jury or the judgment of a court—by which to definitively decide whether conduct is reasonable, creating the apparent paradox that conduct found by a court or jury to be "unreasonable" (or worse) can nevertheless be "objectively reasonable." *See Anderson* v. *Creighton*, 483 U.S. 635, 643 (1987). As this Court recognized in *Anderson*, however, the paradox is purely semantic in nature and can be eliminated by simply changing the words used to describe the relevant concept. *Id.* And there is nothing at all paradoxical about the concept: there are many

The Court has likewise interpreted the very word at issue in this case—"willful"—consistently with the above precedents in order to avoid a constitutional vagueness problem. In *Screws* v. *United States*, 325 U.S. 91 (1945), three law enforcement officers were charged with "willfully" depriving a prisoner of his constitutional rights in violation of the precursor to 18 U.S.C. § 242. Concerned about the constitutional implications of interpreting "willfully" in a way that would permit an officer to be punished for intentionally doing "an act which some court later holds deprives a person of due process of law," this Court interpreted "willfully" to require proof that the defendants had the "specific intent to deprive a person of a federal right made definite by decision or other rule of law." *Screws*, 325 U.S. at 97, 103.

This case can and should be resolved in the same way as *Screws*. Here, as in *Screws*, an unduly broad interpretation of "willful" creates the potential of unconstitutionally punishing defendants for an objectively reasonable interpretation of the law that is later rejected by the courts. Here, as in *Screws*, this constitutional problem can be eliminated by interpreting the statute to require proof that the defendant knew it was violating a provision of FCRA that is sufficiently definite that its meaning at the time of the defendant's conduct was not subject to reasonable debate.

As in the qualified immunity cases, the objective component of the standard adopted in *Screws* "protects 'all but the plainly incompetent or those who knowingly violate the

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circumstances where reasonable people, courts and juries, forced to decide whether conduct is "reasonable," can be expected to reach different conclusions, such that conduct found by some people to be unreasonable might be found by others to be reasonable. The fact that reasonable people might disagree on what constitutes negligence, for example, explains why judgment as a matter of law on negligence issues is rarely appropriate. *See, e.g., Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (summary judgment proper only if "a reasonable jury could [not] return a verdict for the nonmoving party").

law.'" *Anderson*, 483 U.S. at 638 (quoting *Malley*, 475 U.S. at 341). And the subjective component eliminates the possibility of punishment for mere incompetence. Even the objective component alone, applied—as due process requires—to punitive damages as it has been applied in so many other contexts over the last century, has the potential to substantially reduce the "acute danger of arbitrary deprivation of property" from the random imposition of punitive damages for actions about which reasonable people can disagree. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994)). Applied in this case, it prohibits punishing Petitioners for judgments about the meaning of FCRA that are consistent with those made by the district court and the Federal Trade Commission.

CONCLUSION

To the extent that the Ninth Circuit interpreted FCRA to permit statutory and punitive damages to be awarded even though reasonable people—including the district court and the Federal Trade Commission—agreed or could have agreed with the defendants' interpretations of their obligations under FCRA, that interpretation violates the due process clause of the United States Constitution. This Court should reverse.

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Dated: November 13, 2006

639I

(19)

Nos. 06-84 & 06-100

In the Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *ET AL.*,
PETITIONERS
v.
CHARLES BURR, RESPONDENT

GEICO GENERAL INSURANCE COMPANY, *ET AL.*,
PETITIONERS
v.
AJENE EDO, RESPONDENT

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR FREEDOMWORKS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Fair Credit Reporting Act requires an insurance company to give notice of an "adverse action" whenever it makes an initial offer of insurance at a rate higher than the rate the company might have offered if the consumer had perfect credit.

2. Whether an insurance company may be liable for statutory and punitive damages for "willful" violation of the Fair Credit Reporting Act based upon a finding that it acted with "reckless disregard" of the statutory notice requirement, even where the company relied in good faith upon the advice of its counsel.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Fair Credit Reporting Act (FCRA) has been critical to the development of an efficient national credit market, a development that has been of enormous benefit to consumers at all income levels. Indeed, "[o]ne of the hallmarks of the modern U.S. economy is quick and convenient access to consumer credit. Although it would have seemed unimaginable a generation ago, consumers can now qualify for a mortgage over the telephone, walk into a showroom and finance the purchase of a car in less than an hour, and get department store credit within minutes." H.R. Rep. No. 108-263, at 23 (2003). FCRA has facilitated these important developments by promoting information-sharing between consumers and credit providers while protecting consumer privacy.

FCRA's success in creating a more consumer-friendly credit market is threatened by the Ninth Circuit's misinterpretations of key provisions of that statute. In holding that an "adverse action" requiring notice occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score" (*Reynolds* v. *Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1093 (9th Cir. 2006)), the Ninth Circuit requires insurance companies and their affiliates to provide adverse-action notices virtually every time they make an initial offer of insurance. These gratuitous notices likely will confuse consumers, frustrating the educational objective of the statute. And in holding that a "willful" violation of FCRA occurs whenever a company acts in "reckless disregard" of consumers' rights under the statute (*id.* at 1098), the Ninth Circuit

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, the *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

departed from the near-uniform position of other federal courts of appeals, opening the door to punitive awards even where users of credit information relied in good faith on the advice of counsel in determining their obligations under the statute.

Neither FCRA's text nor its structure nor its history compels these results, and FCRA's clear objectives counsel against them. The Ninth Circuit's gloss on the provisions at issue here thus reflects the policy judgments of that court, not the judgments of Congress, and for that reason the decisions below should be reversed.

Amicus curiae FreedomWorks Foundation has a strong interest in that result. FreedomWorks is a nonprofit, nonpartisan organization dedicated to promoting free-market solutions to economic problems at the state and national levels. For more than two decades, FreedomWorks and its predecessors and affiliates (including Citizens for a Sound Economy) have been leading voices on a range of economic policy issues, from taxation and regulation to entitlement reform, competitiveness, and consumer protection. FreedomWorks is interested in these cases because they highlight the importance of reasonable regulation by Congress, not courts, in the development of a consumer credit market that works for creditors and consumers alike.

STATEMENT

To understand the significance of the Ninth Circuit's decisions in these cases, it is necessary to have some familiarity with the realities of FCRA litigation. In the past several years, "there has been a proliferation of class action lawsuits brought under the [FCRA]," in part because of "the availability of fee shifting and statutory damages, and the lack of a class action damages cap." David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006). In nationwide class actions, these statutory damages—$100 to $1,000 per violation—threaten insurance companies and other covered businesses with "crush-

ing liability" that, as Justice Kennedy has recognized, could have "adverse effects on both the national economy and * * * employees." *Trans Union LLC* v. *FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of certiorari).

The cases now before the Court fit this mold. In these class actions, the named plaintiffs sought statutory damages of $100 to $1,000 for each class member, as well as punitive damages and attorney's fees, for alleged violations of FCRA. Among other things, the named plaintiffs alleged that petitioners violated FCRA's "adverse action" notice requirement (see 15 U.S.C. § 1681m) when they failed to tell the plaintiffs that the insurance rates they were offered were higher than the rates they would have received if they had perfect credit. The named plaintiffs further alleged that petitioners' failures to provide such notice constituted "willful" violations of the statute (see 15 U.S.C. § 1681n), entitling them to statutory and punitive damages. The named plaintiffs did not allege any actual damages resulting from the alleged violations.

Although the district court granted summary judgment in favor of the insurance companies, the Ninth Circuit reversed. *First*, the court adopted an expansive definition of "adverse action" for purposes of FCRA's notice requirement. FCRA provides that any person who "takes any adverse action with respect to any customer that is based in whole or in part on any information contained in a consumer report" must give "notice of the adverse action to the consumer." 15 U.S.C. § 1681m(a). With respect to insurance, the statute defines an adverse action as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B)(i).

In part at the suggestion of the Federal Trade Commission, the Ninth Circuit held, as a matter of first impression, that an insurance company may take an "ad-

verse action" in its initial offer of insurance—before a contract even exists. According to the Ninth Circuit, "an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price." *Reynolds*, 435 F.3d at 1091. Thus, "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA" and must provide an adverse-action notice. *Id.* at 1092. In the Ninth Circuit's view, FCRA "requires such notices whenever a consumer pays a higher rate because his credit rating is less than the *top potential score*." *Id.* at 1093 (emphasis added).

Second, the court held that the insurance companies could be liable for "willful" violations of the notice requirement even if they sought, and relied on, the advice of counsel in determining that notice was not necessary. FCRA provides that "[a]ny person who willfully fails to comply with any requirement under [FCRA] with respect to any consumer is liable to that consumer" for statutory damages, punitive damages, and attorney's fees. 15 U.S.C. § 1681n. Contrary to the clear majority position among the courts of appeals, the Ninth Circuit held that the term "willfully" in FCRA "entails a conscious disregard of the law, which means either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA *or in reckless disregard* of whether the policy [or action] contravened those rights." *Reynolds*, 435 F.3d at 1098 (emphasis added) (quotations omitted).

The Ninth Circuit adopted this "reckless disregard" standard based, in part, on its perception of "perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 1099. "Because a reckless failure to comply with FCRA's

requirements can result in punitive damages," the court reasoned, "insurance and other companies will more likely seek *objective* answers from their counsel as to the *true* meaning of the statute." *Ibid.* (emphasis added). Under the Ninth Circuit's rule, a company may be liable for statutory and punitive damages if a court determines that it relied on "creative lawyering that provides indefensible answers" even to issues of first impression. *Ibid.* "In some cases," the court warned, a finding of willfulness may be based on "specific evidence as to how the company's decision was reached, including the testimony of the company's executives *and counsel*." *Ibid.* (emphasis added).

SUMMARY OF ARGUMENT

I. The decisions below should be reversed because they adopt an overly expansive reading of FCRA's notice requirement that undermines the goal of consumer protection. Nothing in the statute suggests the Ninth Circuit's conclusion that notice of "adverse action" is required "whenever because of his credit information a company charges a consumer a *higher initial rate* than it would otherwise have charged." Nor does the statute suggest that an "adverse action" occurs whenever a consumers pays a higher rate than he would if he had *perfect credit*. Requiring insurance companies to provide notices under such circumstances will only drive up the costs of insurance while undermining the essential purpose of adverse-action notices. Without a clear textual warrant, the decisions below impose a notice requirement that is more likely to result in dilution of appropriate adverse-action notices than to enhance consumers' appreciation of their credit information.

II. The decisions below should be reversed for the additional reason that they interpret the term "willful" so broadly as to subject companies to statutory and punitive damages simply for relying upon legal advice that an appellate court later decides was mistaken. Neither the structure nor the history of this FCRA provision suggests

that statutory and punitive damages should be available absent conscious and deliberate violations of the statute. The Ninth Circuit's expansive view of "willful" violations will only raise the costs of compliance with the statute and thus the costs of obtaining insurance or other financial services. This result undermines FCRA's demonstrated success in creating a consumer-friendly credit market.

ARGUMENT

I. The Ninth Circuit's Expansive Reading Of FCRA's Notice Requirement Is Far Broader Than Congress Intended And Actually Undermines Consumer Protection.

As this Court has noted, "Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001) (citing 15 U.S.C. § 1681(a)). To accomplish these objectives, the statute regulates "consumer reporting agencies" that generate "credit reports" for use in determining consumers' eligibility for credit, insurance, and employment. See 15 U.S.C. §§ 1681a, 1681b. Under the statute, consumer reporting agencies must take steps to assure accuracy in credit information, to limit the disclosure of credit information to appropriate parties, and to give consumers access to their credit information so they can correct any mistakes. See *id.* §§ 1681(b), 1681b, 1681g. In addition, FCRA regulates *users* of credit reports such as the insurance companies here—requiring them to give consumers notice of so-called "adverse actions" taken based on their credit information. *Id.* § 1681m(a)(1).

In the decisions below, the Ninth Circuit adopted an unduly expansive interpretation of "adverse action" that imposes new burdens on insurers while undermining the effectiveness of the notice requirement for consumers.

A. The Ninth Circuit's New Rule Requires Insurance Companies And Their Affiliates To Provide Gratuitous Adverse-Action Notices, Thereby Increasing The Costs Of FCRA Compliance And Compromising The Effectiveness Of Appropriate Notices.

The decisions below require an insurance company to provide an adverse-action notice whenever it offers insurance for a price that is higher than the price that might have been offered had the consumer enjoyed a perfect credit score. Because almost every offer of insurance is based, in part, on risks identified in the consumer's credit report, and because only a few consumers have perfect credit, nearly every offer of insurance would have to be accompanied by an adverse-action notice. Moreover, the Ninth Circuit's novel interpretation of "adverse action" requires insurers to issue many more notices than they issued before. This requirement imposes significant new costs of compliance with FCRA—costs that undoubtedly will be passed on to consumers in the form of increased prices or decreased availability of coverage or both.

Even as the Ninth Circuit's rule increases the costs of FCRA compliance for insurers, it actually *undermines* the important functions that Congress intended adverse-action notices to perform by contributing to a phenomenon known as "information overload." "The psychological theory of information overload posits that humans can be overwhelmed by too much information such that their ability to cognitively process the information declines." Marie C. Pollio, *The Inadequacy of HIPAA's Privacy Rule: The Plain Language Notice of Privacy Practices and Patient Understanding*, 60 N.Y.U. Ann. Surv. Am. L. 579, 614 (2004). As Nobel Laureate Herbert Simon explained, "a wealth of information creates a poverty of attention." Herbert A. Simon, "Designing Organizations for an Infor-

mation-Rich World," *in Computers, Communications, and the Public Interest* 37, 40 (Martin Greenberger ed., 1971).[2]

This theory has obvious relevance to any regulatory scheme—including FCRA—that seeks to protect consumers by emphasizing disclosure of information. In the specific context of consumer-protection notices, the "information overload" theory suggests that "if too much information is disclosed to consumers, they are easily confused, cannot use the information, and do not make better decisions as a result." Arnold S. Rosenberg, *Better Than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy*, 44 Colum. J. Transnat'l L. 520, 593 (2006).

To avoid "information overload," disclosures "must be brief and simple enough to be readily assimilated" and "certain details must be omitted." Griffith L. Garwood, *et al., Consumer Disclosure in the 1990s*, 9 Ga. St. U.L. Rev. 777, 782-783 (1993). Moreover, "[t]he failure to meet this prerequisite risks destroying the utility of disclosure." *Ibid.* Indeed, "[a] disclosure that is not read at all or is too complex for practical use is no disclosure" and provides no benefit to consumers. *Ibid.*

As shown below, the adverse-action notices required by the Ninth Circuit are certain to contribute to "information overload" in at least two ways. *First*, the significant increase in the volume of adverse-action notices will diminish the effectiveness of any particular notice. *Second*, the contents of these notices will be more confusing than ever before because they will describe as "adverse" actions that are not really adverse to the consumer at all and will

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[2] See also Carl Shapiro & Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* 6 (Harvard Business School Press 1999) ("Nowadays the problem is not information access but information overload. The real value produced by an information provider comes in locating, filtering, and communicating what is useful to the consumer").

name companies with which the consumer never had any dealings.

1. Increasing the *volume* of adverse-action notices undermines FCRA's goal of educating consumers about their credit information. Common experience and social science research suggest that the more adverse-action notices a consumer receives, the less importance he will attach to any *particular* notice and the less attention he will pay to *all* such notices.

This Court recognized this phenomenon in the context of disclosures required by the Truth in Lending Act (TILA). Under TILA, certain consumer credit transactions must be accompanied by disclosures so that consumers are fully aware of the material terms of their credit agreements. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 559-560 (1980). The animating principle of the statute is "meaningful disclosure." *Id.* at 568. As this Court observed in *Milhollin*, "[m]eaningful disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure * * * and the need to avoid * * * [informational overload.]'" *Ibid.* (alterations in original). This problem of "informational overload" threatens the very objective of TILA, namely, consumer protection.

The Federal Trade Commission has recognized the same danger in the specific context of FCRA adverse-action notices. The Director of the FTC's Bureau of Consumer Protection explained to Congress that "if you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore. The adverse-action notice, as it was originally envisioned, fit well in the set of circumstances where consumers needed to pay attention to the credit report and did not raise a lot of false alarms." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Hous-*

ing, & Urban Affairs, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III).

Unfortunately, by requiring that notice be given "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *Reynolds*, 435 F.3d at 1093, the Ninth Circuit has ensured that there will be "a lot of false alarms" that will only compromise the effectiveness of appropriate adverse-action notices.

2. In addition to increasing the *volume* of adverse-action notices, the Ninth Circuit's rule promises "information overload" and consumer confusion with respect to the *contents* of adverse-action notices as well. Congress made its own judgment about the proper contents of an adverse-action notice. That judgment is reflected in the statute itself, which requires that an adverse-action notice identify the credit reporting agency; state that the credit reporting agency did not make the decision to take the adverse action; state that the consumer is entitled to a free copy of his credit report within 60 days after receiving the notice; and explain that the consumer may dispute the accuracy or completeness of any information contained in his credit report. See 15 U.S.C. § 1681m(a)(1)-(3).

Not satisfied with the notice that Congress envisioned, the Ninth Circuit imposed its own additional requirements. Under the decisions below, an adverse-action notice "at a minimum" must also "communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action." *Reynolds*, 435 F.3d at 1094-1095. Moreover, the decisions below require that an adverse-action notice identify *every affiliated entity* that (theoretically) participated in setting premium rates, whether or not the consumer had any contact with each entity. See *id.* at 1096. A consumer receiving the notice required by the Ninth Circuit thus will wonder why companies with

which he had no dealings are sending him a notice about his credit information. Indeed, he might suspect that his insurer improperly "leaked" his credit report to other companies.

Consumer confusion will be magnified in circumstances where an adverse-action notice accompanies an offer of insurance that was not actually adverse to the consumer's interests. Under the decisions below, an insurance company must give notice of an "adverse action" when it extends an offer of insurance at a rate higher than the best rate available for a consumer with perfect credit. This rule fails to account for situations in which a consumer's credit score, though less than perfect, had *no effect* on his application or even *helped* him obtain insurance.[3]

Suppose, for example, that a consumer with a long list of moving violations applies for auto insurance. Based on this consumer's age, sex, and driving record, the insurer might decline coverage altogether. Or if it does offer insurance, the rate will be relatively expensive. Now suppose the insurer reviews the applicant's credit report, which reveals that the applicant has never missed a payment on his credit cards but almost always makes the minimum payment. This applicant would not have the "top potential score" that the Ninth Circuit emphasizes, but his credit experience might change—*for the better*—the insurer's assessment of the risk he poses. So the insurer would make an offer of insurance at a rate that is

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[3] A consumer's credit score reflects payment history, amounts owed, length of credit history, new accounts, and the types of credit in use. See *Understanding Your FICO Score* 9-14 (Fair Isaac Corp. 2005), *available at* http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf. Thus, even if a consumer's payment history was spotless, he still might not have a perfect credit score. Given the range of factors that contribute to the score, it is not surprising that only 13 percent of consumers have a credit score higher than 800 (out of a possible 850). See *id.* at 7.

lower than the rate available based solely on the applicant's non-credit-related characteristics but *higher* than the rate available to a person with perfect credit.

Giving this consumer an adverse-action notice along with his offer of insurance—as the Ninth Circuit requires—would make little sense to the insurer or the consumer. The insurer knows that the consumer's credit information is what has made it possible for the consumer to obtain insurance at all. And the consumer—who never expected to be treated as if he had perfect credit, since he never had perfect credit—will not understand what is "adverse" about his being offered insurance despite his risk characteristics.

Providing adverse-action notices with initial offers of insurance defies common sense, and will likely confuse consumers rather than educate them. As this Court has observed, *more* notice and *effective* notice are two very different things. See *Milhollin*, 444 U.S. at 569. Discerning the appropriate use of adverse-action notices requires making sensitive policy judgments based on empirical data from the fields of communications and consumer psychology—to ensure that disclosure does not result in "information overload." As the decisions below demonstrate, this policymaking task is better undertaken by legislatures than by courts.

B. Contrary To The FTC's Position Below, The Ninth Circuit's Expansive Interpretation Of "Adverse Action" Is Not Supported By The Statutory Text Or History And Is Inconsistent With The Fundamental Objectives Of The Statute.

It is bad enough that the decisions below increase the costs of FCRA compliance (and thus the costs of insurance) without providing any additional benefit to consumers. Even worse, the decisions below achieve this result without any clear textual or historical warrant and contrary to the essential purposes of the statute.

1. Nothing in the text or structure of the FCRA compels the conclusion that an adverse-action notice is required whenever an insurer offers insurance at a rate higher than the rate that would be available to a consumer with perfect credit. FCRA requires an insurance company to provide notice to the consumer of any adverse action that it takes in connection with its underwriting decisions, based in part on the consumer's credit report. 15 U.S.C. § 1681m(a)(1). In the context of insurance, FCRA defines adverse action as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i). The cases before the Court do not involve the denial or cancellation of insurance, but only an *initial offer* of insurance. Thus, the question in these cases is whether an insurance company's initial offer of insurance can reflect "an increase in any charge for" insurance and thus an "adverse action" requiring notice.

According to the Ninth Circuit, "the statute's text is clear" and compels the conclusion that an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score." *Reynolds*, 435 F.3d at 1092-1093. But nothing in the statute's text even suggests, much less compels, a comparison between the consumer's actual credit rating and "the top potential score."

In fact, the text speaks of an "increase" in the "charge" for insurance. As the court below acknowledged, the word "increase" ordinarily means "to make something greater." *Id.* at 1091. And the word "charge" ordinarily means "the price demanded for goods or services." *Ibid.* Thus, for an insurance company to effect "an increase in any charge" for insurance, it must somehow make greater the price it demands for insurance. But "greater" is always relative to some referent. And that referent is missing from the text of the statute.

Since that specific term is missing, the Court must draw a reasonable inference from the text and structure of the statute. The obvious inference is that an insurance company can only "increase" a "charge" that already exists. Especially in the context of contractual negotiations, it would be unusual to speak of one party's "increasing" the price of its goods or services before it even offered to sell those goods or services.

The Ninth Circuit drew a different inference, relying upon the phrase "any insurance, existing or applied for." According to the Ninth Circuit, this "existing or applied for" language "demonstrates [Congress's] intent that 'adverse actions' apply to all insurance transactions—from an initial policy of insurance to a renewal of a long-held policy." *Ibid.* But this language cannot bear the weight of the Ninth Circuit's conclusion. To say that an insurance company may take an "adverse action" with respect to an application for insurance—*by denying the application*—is not to say that an insurance company may take "adverse action" with respect to an application for insurance *by other means* as well.

Indeed, the phrase "existing or applied for" cannot apply wholesale to each of the components of the "adverse action" definition. As explained above, FCRA defines "adverse action" as a "denial" of insurance, a "cancellation" of insurance, an "increase in any charge" for insurance, or a "reduction or other adverse or unfavorable change in the terms of coverage or amount" of insurance. 15 U.S.C. § 1681a(k)(1)(B)(i). It makes no sense to speak of the "denial" of an existing insurance contract, or the "cancellation" of insurance that has only been applied for. And it is hardly common to speak of increasing the charge or changing the terms of insurance that has not yet been extended. Thus, the only reasonable interpretation of the "adverse action" definition is that an insurance company takes an "adverse action" when it denies a consumer's *application* for insurance; cancels his *existing* insurance; or raises the price or otherwise changes the terms of his *existing* insur-

ance. For purposes of these cases, then, there must be an existing insurance contract before there can be any *increase* in the charge for that insurance.

Finally, even if it were possible to find an "adverse action" arising from an insurance company's initial offer of insurance, the Ninth Circuit's holding that an "adverse action" occurs whenever a consumer does not receive the terms he would have received if he had *perfect credit* is not supported by the statute. Indeed, the text itself makes no reference to the hypothetical perfect credit score. If a consumer receives an offer of insurance at a certain price and on certain terms based on non-credit-related characteristics—*e.g.*, age, sex, or driving record—then he is adversely affected by his credit rating only if the insurer, after considering the credit rating, *changes* the offer by raising the price or reducing the coverage or otherwise making the terms less favorable. The relevant comparison is between the applicant described by all his characteristics *except* his credit rating and the same applicant described by all his characteristics *including* his credit rating.

In short, there is no sound textual basis for the Ninth Circuit's expansive interpretation of "adverse action."

2. Nor is there any sound basis for that interpretation in the legislative history, including the history cited by the Federal Trade Commission below. The report accompanying the Senate bill that was ultimately enacted into law, for example, says that the bill would apply to "[t]hose who * * * *charge a higher rate for credit or insurance* wholly or partly because of a consumer report." S. Rep. No. 91-517, at 7 (1969) (emphasis added). But this phrase, like the statute itself, begs the question whether a consumer can be "charge[d] a higher rate" before a contract of insurance even exists. It surely does not answer the question.

The same is true of Congress's more recent attempts to revise the statute. In the early 1990s, Congress considered several bills designed to extend FCRA's reach to us-

ers of credit reports not mentioned in the Act. See, *e.g.*, H.R. 3596, 102d Cong. § 102(a) (1992) (extending FCRA to cover adverse actions triggered by "a report for the cashing of a check" and "an application for the leasing of real estate"). These *unsuccessful* efforts to cover specific non-insurance transactions cannot demonstrate any prior legislative intention to apply the notice requirement to initial offers of insurance.

And when, in 1995, Congress successfully broadened FCRA to cover adverse actions occurring when insurance is "applied for," it did not file a report explaining the impact of this amendment. Although a report did accompany a non-enacted proposal, S. 650, that report simply repeats the statutory language without reaching the question presented here. See S. Rep. No. 104-185, at 31-32 (1995).

In short, the legislative history does not address the question whether an "adverse action" can occur in making an initial offer of insurance, much less support the Ninth Circuit's expansive interpretation of "adverse action."

3. The Ninth Circuit's rule also upsets the careful balance of interests that Congress struck when it enacted the statute. Congress enacted FCRA recognizing that "[t]he banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

Reliable credit information is essential to risk assessment and pricing decisions in the consumer credit market. Research has demonstrated a significant correlation between credit scores and the number and size of future losses. See Bureau of Business Research, *A Statistical Analysis of the Relationship Between Credit History and Insurance Losses* 10 (2003), *available at* http://bbr.icc.utexas.edu/Publications/bbr_creditstudy.pdf.. "Overall, research and creditor experience has consistently indicated

that credit reporting company information, despite any limitations that it may have, generally provides an effective measure of the relative credit risk posed by prospective borrowers." Robert B. Avery, *et al.*, *An Overview of Consumer Data and Credit Reporting*, Federal Reserve Bulletin 47, 51 (Feb. 2003).[4]

Given this correlation, insurance companies frequently use credit information for legitimate risk-assessment purposes. "Risk classification allows insurers to divide individuals into groups with similar claims and set prices based on the probability of future loss. Driving history, age and gender are common variables to classify risk, but increasingly insurance scores with credit have been found to be more reliable predictors of future risk." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 67 (Statement of Wayne T. Brough).

Such risk-based pricing is beneficial to consumers. Because credit risk is a better predictor of future claims and losses than other information, insurance companies that rely on credit risk are better able to avoid setting prices unnecessarily high.[5] Moreover, just as credit information

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[4] See also *Fair Credit Reporting Act: How It Functions for Consumers and the Economy, Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 108th Cong. 40 (2003) (Statement of Kevin T. Sullivan, Vice President and Deputy General Counsel, Government Relations, Allstate Insurance Company) ("the insurance industry and Allstate in particular began to recognize a strong correlation between major public record items on credit reports and future loss potential"); *id.* at 67 (Statement of Wayne T. Brough, Chief Economist, Citizens for a Sound Economy) ("there is a very strong statistically significant correlation between risk and credit scores").

[5] See *id.* at 233 (Testimony of Wayne T. Brough) ("Restricting credit history information as an underwriting tool would result in higher costs for insurers and higher premiums for policyholders").

helps regulate absolute pricing, it also improves the fairness of risk classification and thereby increases the availability of insurance to classes of consumers who otherwise might go without coverage. As a Federal Reserve official explained, "[c]onsumers benefit from the increased availability and lower cost of credit made possible by the use of credit scoring models. Credit scoring also may help to reduce unlawful discrimination in lending to the extent that these systems are designed to evaluate all applicants objectively and thus avoid issues of disparate treatment." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions*, *supra*, at 551 (Prepared Statement of Dolores S. Smith, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System).[6]

Encouraging the use of such risk-based information is fully consistent with the balance that Congress struck in enacting FCRA. While Congress responded to the "need to [e]nsure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy," Congress also

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[6] See also *id.* at 59 (Response to Written Questions of Senator Crapo from J. Howard Beales, III) ("Credit scoring and automated underwriting work in significant ways to minimize the bias—intentional or incidental—that can be introduced into credit decisions in a judgmental system, because credit scoring models and automated underwriting systems are based on actual performance data, not assumptions about potential risk. * * * Because these data are objective and neutral, we believe that the current scoring systems treat consumers more fairly"); *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 232 (Testimony of Wayne T. Brough) ("[W]hen consumer credit histories are used as an underwriting criterion, they tend to increase the fairness and accuracy of risk classification. * * * With the ability to classify risk more accurately, insurers gain the ability to provide a wider array of products that can be offered to customers they otherwise could not serve").

recognized that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(3)-(4). The statute thus "strikes a balance between the privacy interests of consumers with respect to the contents of their credit reports and the need of businesses to access the information required to make accurate real time assessments of consumer qualifications." S. Rep. No. 108-166, at 5 (2003).[7]

The Ninth Circuit's decisions threaten to upset this balance by requiring disclosure of insurer decisions that are not truly "adverse" in any meaningful sense. Because, as noted earlier, such disclosures would likely result in a blizzard of meaningless but annoying consumer notices, the Ninth Circuit's decisions tend to discourage insurers from using credit information in their initial offering decisions. By discouraging the use of that information, those decisions undermine the balance that Congress struck between financial services' need to make full use of credit information and consumers' interest in privacy and disclosure.

II. The Ninth Circuit's Expansive Interpretation Of FCRA's Willful-Violation Provision Exposes Companies To Statutory And Punitive Damages For Unwitting Violations Of The Statute And Increases The Costs Of Credit To Consumers.

The Ninth Circuit's over-regulation of consumer credit transactions is harmful enough. But the court compounded that error with another one that is perhaps even more certain to drive up the costs of credit and insur-

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[7] See also *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions*, *supra*, at 6 (Statement of J. Howard Beales, III) ("The 1970 Act, along with the 1996 Amendments, provided a carefully balanced framework, making possible the benefits that result from the free, fair, and accurate flow of consumer data").

ance: The decisions below hold that an insurance company commits a "willful" violation of FCRA—and thus may be liable for statutory and punitive damages—when it acts with "reckless disregard" for consumers' rights under the statute. And according to the Ninth Circuit, a company may act recklessly even when it follows its counsel's advice concerning statutory requirements, even when that advice concerns an issue of first impression, and even when that advice is approved by at least one federal judge. This new rule is not supported by the structure of the statute or its legislative history, and it creates costly practical problems for companies and their counsel. By raising the costs of FCRA compliance in this manner, the decisions below threaten to stifle the information-sharing that has been critical to the development of a consumer-friendly credit market.

A. The Ninth Circuit's "Reckless Disregard" Standard Is Not Supported By The Structure Of The Statute Or Its Legislative History.

By its terms, FCRA subjects insurance companies to statutory and punitive damages liability only for "willful" violations of statutory requirements. See 15 U.S.C. § 1681n(a). As this Court has explained, "willful" is a term of "many meanings," and its proper interpretation is "often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998); *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *Spies* v. *United States*, 317 U.S. 492, 497 (1943). The textual and historical "context" in which the willfulness requirement appears confirms that Congress did not intend to make statutory and punitive damages available for anything less than knowing, deliberate violations of statutory requirements. The Ninth Circuit's contrary holding stands in sharp contrast to the majority rule among the federal circuits, and it should be reversed.

1. The text of the statute strongly suggests that statutory and punitive damages should be reserved for only the

most egregious FCRA violations. To be sure, FCRA does not expressly define "willful" in either of the two provisions where that term is used. And the context of the first provision—the one at issue here—sheds little light on the matter; it simply authorizes statutory and punitive damages for "willful" violations of most FCRA requirements. 15 U.S.C. § 1681n(a)(1)(A).

But the second provision is highly instructive: It entitles a consumer to receive the greater of his actual damages or $1,000 for a "willful" violation of FCRA's prohibition against "obtaining a consumer report *under false pretenses* or *knowingly* without a permissible purpose." *Id.* § 1681n(a)(1)(B) (emphasis added).[8] Thus, it is clear from this provision that "willful" describes misconduct that is *at least* knowing. Because a statutory term should ordinarily be deemed to have the same meaning throughout a statute (see *Ratzlaf*, 510 U.S. at 143), the term "willful" should have the same meaning in both provisions of FCRA. A company should not be liable for "willfully" violating FCRA's notice requirement absent proof that it *knew* it was violating the statute.

2. This conclusion is confirmed by the legislative history, which shows that Congress distinguished "willful" misconduct from grossly negligent, or reckless, misconduct, and made a considered decision to reserve the drastic remedies of statutory and punitive damages for only the most egregious violations. The original Senate bill required the plaintiff to show that the defendant was "grossly negligent" to obtain *actual* damages, and that the violation was "willful" to obtain *punitive* damages. See S. 3678, 91st Cong. §§ 616, 617 (1970). Because gross negligence is "little different from recklessness as generally

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[8] FCRA also provides a criminal penalty for "any person who *knowingly and willfully* obtains information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q (emphasis added).

understood in the civil law" (*Farmer* v. *Brennan*, 511 U.S. 825, 836 n.4 (1994); accord *Restatement (Second) of Torts* § 282 cmt. e (1965)), the effect of the Senate bill was to distinguish misconduct that was merely reckless from misconduct that was more egregious, *i.e.*, "willful." Likewise, the House bill distinguished recklessness from willfulness, rejecting alternative proposals that would have authorized punitive damages for violations that were "grossly negligent or willful." See H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970). Thus, it was the unmistakable intention of Congress to set apart conduct that was more egregious than gross negligence (or recklessness) for punitive damages liability.

3. Consistent with the structure of FCRA and its legislative history, most federal circuits have concluded that statutory and punitive damages are available only where the defendant knowingly and consciously violated FCRA's requirements. See *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357, 368-370 (8th Cir. 2002); *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Stevenson* v. *TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993).[9] As the Eighth Circuit explained in *Phillips*, "the defendant must commit the act that violates the Fair Credit Reporting Act with knowledge that he is committing the act * * * and he must *also* be conscious that his act impinges on the rights of others." 312 F.3d at 368 (emphasis added). The Ninth Circuit's relaxed standard for "willful" violations of FCRA is the outlier, and it should be rejected.

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[9] Although the Third Circuit seemed to adopt a "reckless disregard" standard, it further explained that a defendant's conduct must be "on the same order as willful concealments or misrepresentations" to warrant statutory and punitive damages. *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).

B. The Ninth Circuit's Rule Increases The Costs Of Compliance With FCRA, Thereby Increasing The Costs Of Credit To Consumers And Jeopardizing FCRA's Success In Creating An Efficient Credit Market.

The Ninth Circuit's expansive interpretation of "willful" also increases the costs of FCRA compliance by opening the gates to statutory and punitive damages claims even where covered firms relied in good faith on the advice of counsel with respect to unsettled issues under FCRA. See *Reynolds*, 435 F.3d at 1099. The availability of statutory and punitive damages in such situations will create significant pressures to settle even dubious claims—to the ultimate detriment of consumers—even as it fundamentally alters the relationship between insurance companies (and other credit providers) and their counsel. This result promises to stifle the information-sharing that has been critical to the development of an efficient credit market under FCRA.

1. The Ninth Circuit's position leaves companies little room to defend against plaintiffs' claims for statutory and punitive damages. Under the decisions below, it is no defense that the statutory requirement was unclear; that the company relied in good faith on its counsel's interpretation of that requirement; or even that a federal district court agreed with counsel's interpretation. Indeed, the district court in these cases granted the insurance companies judgment as a matter of law on the ground that their interpretations of FCRA's notice requirements were correct. But the court of appeals disagreed, and went so far as to label those same interpretations "implausible." *Ibid.* In sum, the decisions below appear to give companies no reliable defense to a claim for statutory and punitive damages other than *a court of appeals' ultimate conclusion* that counsel correctly interpreted the statute.

This is not much of a defense, especially since the burden appears to rest on the *company* to refute an allegation

of "willful" violation of the statute. According to the Ninth Circuit, a business may be liable for statutory and punitive damages *unless* it "diligently and in good faith" sought to determine its statutory obligations and "thereby" took a "reasonable" or "tenable" position under the statute. *Ibid.* Under this standard, it will be nearly impossible to obtain early resolution of meritless FCRA claims: A named plaintiff seeking statutory and punitive damages in a nationwide class action will survive a motion to dismiss based on nothing more than a bare assertion, on information and belief, that the company "willfully" violated some FCRA requirement.

This result increases the likelihood that companies subject to FCRA will bear the costs of statutory and punitive damages awards, either by paying large judgments or by entering into "blackmail settlements." As Judge Easterbrook has explained, settlement in class litigation "becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-1016 (7th Cir. 2002); see also *Parker* v. *Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (class actions for statutory damages "could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements"); *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.) (class treatment "can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight"); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"). Judge Friendly made the same observation, explaining that "[w]hile the benefits to the individual class members are usually minuscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled."

Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

Consumers will pay the price for covered firms' increased exposure to statutory and punitive damages liability. The increased risk will undoubtedly translate into higher rates. And it may well result in reduced coverage for certain classes of insureds.

2. More frequent statutory and punitive damages awards and blackmail settlements are not the only costs imposed by the decisions below. In addition, businesses likely will react to the Ninth Circuit's lax standard for "willful" violation either by conducting their operations in the most conservative manner possible, by obtaining "second opinions" to test their own counsel's advice, or both. This is hardly the model that the Court envisioned in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), when it affirmed the role of corporate counsel in advising their clients how to comply with complicated, sometimes counterintuitive, statutes and regulations. Indeed, our system expects businesses to seek, *and rely on*, the advice of their counsel in determining how to comply with federal statutory requirements. The mere fact that a court of appeals later determines that counsel's advice was incorrect might be enough to warrant an award of actual damages, but it cannot be enough to justify statutory and punitive damages.

The pernicious effect of the decisions below is thus to increase the costs of the most responsible corporate behavior—consulting legal counsel before engaging in business practices regulated by federal statute. See *id.* at 392 (acknowledging the "valuable efforts of corporate counsel to ensure their client's compliance with the law"). These costs undoubtedly will be passed on to consumers, who will receive no additional benefit beyond that which ordinary remedies would provide.

3. By increasing the costs of compliance with FCRA in this manner, the Ninth Circuit effectively reduces compa-

nies' incentives to make appropriate use of credit information. This result threatens to undo the tremendous benefits that the statute has provided. The balance that Congress struck in FCRA—allowing businesses to use credit information while providing consumers with notice of genuinely adverse credit-related actions—has been vindicated by the performance of the Nation's consumer credit market. Credit is available to more consumers today than ever before, at least in part because FCRA created a uniform national system of credit reporting that promotes efficiency in information-sharing, accuracy in risk assessment, and privacy for consumers. In short, "American consumers have realized undeniable benefits from the free flow of credit reporting information to lenders and other financial services providers." H.R. Rep. No. 108-263, at 25 (2003).

Consumers benefit from the free flow of credit information in several ways. As one Federal Reserve Board official explained in testimony before a congressional committee: "The ready availability of accurate, up-to-date credit information from consumer reporting agencies benefits both creditors and consumers. Information from consumer reports gives creditors the ability to make credit decisions quickly and in a fair, safe and sound, and cost-effective manner. Consumers benefit from access to credit from different sources, vigorous competition among creditors, quick decisions on credit applications, and reasonable costs for credit." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 431 (Statement of Dolores Smith).[10]

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[10] See also *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 86 (Statement of Cheryl St. John, Vice President, Fair Isaac Corporation) ("with credit scoring, more people get credit; they get it faster; and it is more affordable. By enabling lenders to extend credit quickly, while safely managing their risk, credit scores have made credit more accessible at lower rates to more people. More people can get

Moreover, the consumer credit market that FCRA has helped create is more "democratized" than ever before, with credit available to more consumers at all income levels. "Over the last 30 years, the availability of non-mortgage credit to households in the lowest quintile of income has increased by nearly 70 percent—including a nearly three-fold increase in the number of low-income households owning credit cards just in the last decade." H.R. Rep. No. 108-263, at 23 (2003). According to one congressional report, "[t]his unprecedented 'democratization' in the availability of credit to low- and moderate-income consumers has been made possible in significant measure by the emergence of a national credit reporting system" facilitated by FCRA. *Ibid.*

These important successes are jeopardized by the decisions below. Especially by making statutory and punitive damages available for unwitting violations of the statute, the Ninth Circuit has raised the costs of FCRA compliance and reduced companies' incentives to make appropriate use of credit information. In short, the decisions below threaten to stifle the information-sharing that has been critical to the development of a consumer-friendly credit market under FCRA.

* * * * *

The decisions below rest on fundamental misreadings of FCRA that significantly increase the costs of compliance with the statute. Users of credit reports will pay those costs in the first instance, but consumers will pay them in the end, in the form of higher prices and reduced coverage. The decisions below thus amount to judicial over-regulation of the consumer credit market, and they should not be permitted to jeopardize FCRA's continued success

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credit because credit scores allow lenders to safely assess and account for the risk of consumers who are new to that lender and who many have been turned away by other lenders").

in promoting the free flow of credit information while protecting consumer privacy.

CONCLUSION

The decisions below should be reversed.

Respectfully submitted.

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NOVEMBER 2006

C75B

Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR, *et al.*,

Respondents.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE INSURANCE COMMISSIONERS OF THE STATES OF DELAWARE, ARKANSAS, CALIFORNIA, GEORGIA, IOWA, KANSAS, MICHIGAN, MONTANA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, UTAH AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This brief is submitted in support of respondents Charles Burr, Shannon Massey and Ajene Edo on behalf of thirteen state insurance commissioners: (1) Matthew P. Denn, the Insurance Commissioner of Delaware; (2) Julie Benafield Bowman, the Insurance Commissioner of Arkansas; (3) John Garamendi, the Insurance Commissioner of California; (4) John W. Oxendine, the Insurance Commissioner of Georgia; (5) Susan E. Voss, the Insurance Commissioner of Iowa; (6) Sandy Praeger, the Insurance Commissioner of Kansas; (7) Linda A. Watters, the Insurance Commission of Michigan; (8) John Morrison, the Insurance Commissioner of Montana; (9) Morris J. Chavez, Superintendent of the Insurance Division of the New Mexico Public Regulation Commission; (10) Jim Poolman, the Insurance Commissioner of North Dakota; (11) Kim Holland, the Insurance Commissioner of Oklahoma; (12) D. Kent Michie, the Insurance Commissioner of Utah; and (13) Mike Kreidler, the Insurance Commissioner of Washington (collectively "the Amici State Insurance Commissioners").

This case involves the interpretation of provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, that directly impact the millions of consumers who purchase and renew insurance policies every year. The statutory provisions at issue govern the rights of consumers and the responsibilities of insurance companies with respect to the use of consumer credit information in the underwriting and rating process.

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1. Written consents of all parties have been filed with the Clerk. This brief was authored in whole by counsel for the amici curiae. No party or his/her/its counsel authored the brief in whole or in part, and no person or entity other than the amici curiae made any monetary contribution to the preparation or submission of the brief.

One of the most important missions of the Amici State Insurance Commissioners (and other state insurance commissioners) is to ensure reliable insurance coverage at reasonable rates for consumers. Because a growing number of personal auto and homeowners insurance companies use consumer credit information when deciding whether to issue or renew coverage and when deciding what prices to charge for coverage, the Amici State Insurance Commissioners have undertaken to educate the public about the use of credit scores in the underwriting process and to protect the public by implementing and enforcing policies that promote the responsible and accurate use of consumer credit information.

This case represents an opportunity for the Amici State Insurance Commissioners to further their collective mission of protecting consumers by supporting interpretations of the FCRA that (a) put valuable information in the hands of consumers, (b) provide appropriate incentives for insurance companies that use consumer credit information to adopt procedures that assure compliance with the law, and (c) hold insurance companies accountable when they adopt policies that recklessly disregard consumer rights in contravention of the FCRA.

SUMMARY OF ARGUMENT

The Ninth Circuit correctly determined that the defendant insurance companies were not entitled to summary judgment on the plaintiffs' claims that the insurance companies' failure to send them "adverse action" notices under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, could warrant the enhanced remedies that § 1681n provides when a person covered by the statute has "willfully failed to comply" with any of the statute's requirements.

This Court has long held that "willful" violations of civil statutes encompass both "knowing" noncompliance and "reckless disregard" for whether one's conduct complies with a statutory obligation. The Ninth Circuit's decision that the enhanced remedies of § 1681n could be triggered by an insurance company's "reckless disregard" for whether a chosen interpretation of the FCRA's requirements complied with the statute was therefore correct.

The Ninth Circuit's description of the types of conduct that could satisfy a "reckless disregard" standard was likewise correct. The court's description would not permit liability under § 1681n for conduct that is merely negligent. A credit information user who purposely relies on "creative lawyering" to provide "creative" but "indefensible" answers to questions about the extent of the user's obligations under the FCRA is not acting negligently. It is acting in conscious or reckless disregard of what the statute requires.

The Ninth Circuit also correctly determined that petitioner GEICO's policy, in place between 1999 and 2002, for determining what constitutes an "adverse action" had no basis in the statute and could amount to a "willful" violation of the FCRA.

This Court should affirm the Ninth Circuit because its decision is consistent with the FCRA's underlying policy of consumer protection. The statute itself provides that credit reporting agencies and users of credit information bear "grave responsibilities" to act fairly and accurately and to respect the rights of consumers. The Ninth Circuit's decision provides appropriate incentives to assure compliance with the statute's requirements.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISIONS TO REVERSE THE GRANTS OF SUMMARY JUDGMENT WERE CORRECT AND SHOULD BE AFFIRMED

The Ninth Circuit's decisions in *Edo v. GEICO Casualty Co.* and *Burr v. Safeco Insurance Co. of America* should be affirmed because they correctly determined that the defendant insurance companies in those cases were not entitled to summary judgment on the plaintiff consumers' claims that the "adverse action" policies that resulted in Messrs. Edo and Burr and Ms. Massey not being sent "adverse action" notices failed to comply with the requirements of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*

In Mr. Burr's and Ms. Massey's cases, petitioner Safeco Insurance Company of America and its related companies ("Safeco") did not consider that Safeco had taken an "adverse action" against these consumers under § 1681a(k)(1)(B)(i), when different Safeco companies quoted them an insurance premium that was higher than the premium that the company would have quoted if their credit information had been better, because the particular company had never quoted an insurance premium to Mr. Burr or Ms. Massey before, and Safeco had concluded that it did not need to send "adverse action" notices when it made an initial quote to a new customer.

In Mr. Edo's case, petitioner GEICO Indemnity Company and its related companies ("GEICO") did not consider that GEICO had taken an "adverse action" under the same provision, § 1681a(k)(1)(B)(i), because, when GEICO compared the automobile insurance premium that its

underwriting formula determined was appropriate for Mr. Edo (based, in part, on his credit score) to the premium that would have been charged to someone who had what GEICO considered to be an "average" credit score, the premium using his actual credit score was the same.

Each of these decisions that an "adverse action" within the meaning of the FCRA had not occurred – and that therefore an "adverse action" notice need not be sent – was based on the insurance companies' respective interpretations of the extent of their obligations under the FCRA. In particular, the decisions were based on the insurance companies' respective policies or practices as to what circumstances required that an "adverse action" notice be sent to a customer or prospective customer, informing him or her that the insurance company's use of the person's credit information had adversely affected the premium the customer would be charged.

In each case, the trial court granted summary judgment for the insurance company defendants because it concluded that the insurance companies' interpretations of their obligations under the FCRA were correct.

The Ninth Circuit reversed the grants of summary judgment on the basis that the insurance companies' interpretations of their obligations under the FCRA were inconsistent with the plain language of the statute. *See Reynolds v. Hartford Financial Services*, 435 F.3d 1081, 1092-93, 1097-1100 (9th Cir. 2006); *Spano v. Safeco Corp.*, 140 Fed. Appx. 746, 747 (9th Cir. 2005). It also concluded that, because some of the proffered interpretations were "implausible," the cases should be remanded to the trial court for a determination of whether the insurance companies'

respective failures to comply with the FCRA's "adverse action" requirements were "willful" – thereby triggering the enhanced remedies of § 1681n. *Id.*

On the issue of what could constitute a "willful" failure to comply under § 1681n, the Ninth Circuit said:

> Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in FCRA. Interestingly, there is no legislative history to explain what Congress intended by the use of that term.
>
> We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive."
>
> Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the

policy [or action] contravened those rights." [citing *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (3rd Cir. 1997)] We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful.

* * *

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate

purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

435 F.3d at 1097-99 (citations and footnotes omitted).

Petitioners and the insurance industry amici that support their position paint the Ninth Circuit's decision as "expansive and unprecedented," Brief for Petitioners in 06-100 ("Safeco Br."), at 1, "eccentric and wrongheaded," Brief of Mortgage Insurance Companies of America as Amicus Curiae in Support of Petitioners in 06-82, 06-84, 06-100 and 06-101 (Aug. 21, 2006), at 4, and inconsistent with what they describe as "twenty years of settled judicial interpretation" by federal courts of appeals that a "willful" failure to comply with any of the FCRA's requirements can be demonstrated only with evidence that the failure to comply was "knowing," *see* Safeco Br. at 27.

By contrast, the United States agrees with the Ninth Circuit that "reckless disregard" for whether a chosen interpretation of the FCRA's requirements violates the rights of affected consumers can support a finding of willfulness under § 1681n. *See* Brief of the United States as Amicus Curiae in Support of Vacatur in No. 06-84 and Reversal in 06-100 ("United States Br."), at 8-20. The United States asserts, however, that the standard for "reckless disregard" that the Ninth Circuit described is incorrect because it is too close to a negligence standard. *Id.* at 20-24.

The Amici State Insurance Commissioners urge the Court to affirm the Ninth Circuit because its construction of the FCRA provisions at issue in these cases was correct under the law and because the standards it adopted will more effectively implement Congress' intent that users of consumers' credit information act in ways that "assure compliance," 15 U.S.C. § 1681m(c), with the statute's requirements.

A. This Court Has Long Held That "Willful" Violations of Civil Statutes Encompass Both "Knowing" Noncompliance and "Reckless Disregard" for Whether One's Conduct Complies With a Statutory Obligation

Nearly twenty-two years ago, this Court concluded that the enhanced remedies that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, provides for "willful" violations of that statute – *i.e.*, double damages – could be triggered when a defendant acted either knowing that its conduct violated the ADEA or in reckless disregard of whether its conduct violated the statute. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 11 (1985).

Three years later, the Court again concluded that the use of the word "willful" in a civil statute – in that case, the statute of limitations provision in the Fair Labor Standards Act, 29 U.S.C. § 255(a) – encompassed both knowing and reckless conduct. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). The Court said:

> In common usage the word "willful" is considered synonymous with such words as "voluntary," "deliberate," and "intentional." See Roget's International Thesaurus § 622.7, p. 479; § 653.9, p. 501 (4th ed. 1977). The word "willful" is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of

> whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the [Fair Labor Standards] Act.

486 U.S. at 133.

In the face of these two decisions by this Court on what can constitute a "willful" violation of other civil statutes, the Ninth Circuit's determination that the use of the term "willfully" in § 1681n of the FCRA encompasses both knowing and reckless conduct is neither unprecedented nor extreme. This Court decided *Thurston* in 1985. To the extent that there have been courts of appeals that have limited the scope of "willful" noncompliance with the FCRA's requirements to knowing noncompliance in the last twenty years, as petitioners argue, those decisions have ignored this Court's decisions in *Thurston* and *Richland Shoe.*

Even if the Court were to look at the context of the other provisions of the FCRA to see if Congress intended a different meaning for the word "willfully" in § 1681n, *see, e.g., United States v. Murdoch*, 290 U.S. 389, 395 (1933) ("willful" must be interpreted in the context of the statute's other provisions), there are no fewer than four other places in the FCRA where Congress expressly required that conduct be "knowing and willful" or "knowing" to trigger some civil or criminal consequence. *See* 15 U.S.C. §§ 1681n(a)(1)(B), 1681q, 1681r, 1681s(a)(2)(A). By limiting enhanced liability under § 1681n(a)(1)(A) – the provision at issue in these cases – to "willful" failure to comply, Congress plainly intended something less than the "knowing" standard that petitioners espouse. The Ninth Circuit's decision correctly recognized this and should be affirmed.

B. The Ninth Circuit's "Reckless Disregard" Standard Does Not Permit the Enhanced Remedies of Section 1681n For Conduct That Is Merely Negligent

Petitioners and the United States assert that the Ninth Circuit's standard for what could constitute a "reckless disregard" for a credit information user's obligations under the FCRA was too lax and would impose enhanced liability for conduct that is merely negligent. The Ninth Circuit, however, properly recognized that "willful" noncompliance must be more than mere negligent noncompliance. Its elaboration of what types of conduct *could* constitute 'willful" noncompliance – thereby meriting further development of a factual record in the trial court – demonstrates that it was, in fact, limiting its "reckless disregard" standard to purposeful conduct directed at adopting indefensibly restrictive interpretations of a credit information user's obligations under the FCRA.

To be sure, this Court has previously rejected a standard for "reckless disregard" of a defendant's statutory obligations that would impose liability if the defendant acted without a reasonable basis for believing that it was complying with the statute. *McLaughlin v. Richland Shoe Co.*, 486 U.S. at 134-35. The Court said that such a standard would "permit a finding of willfulness to be based on nothing more than negligence." *Id.* at 135. But the Ninth Circuit did not adopt such an "acting without a reasonable basis" standard.

Rather, the Ninth Circuit made clear that a finding of "reckless disregard" could be based on conduct it described as follows:

> Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse

> incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute. . . .
>
> A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

435 F.3d at 1099. A credit information user who purposely relies on "creative lawyering" to provide "creative" but "indefensible" answers to questions about the extent of the user's obligations under the FCRA is not acting negligently. It is not merely acting without a reasonable basis for believing that its conduct complies with the statute. It is acting in conscious or reckless disregard of what the statute objectively

requires. Such a standard is not too lax for "reckless disregard" and does not expose a credit information user to the enhanced remedies of § 1681n for conduct that is merely negligent.

C. The Ninth Circuit Correctly Determined That GEICO's Policy of Comparing the Premium to be Charged After Considering a Consumer's Credit Score With the Premium That Would Be Charged Someone With an "Average" Credit Score Cannot Be Justified Under the FCRA

GEICO's petition also raises the issue of whether the Ninth Circuit erred in determining that GEICO's adverse action notice policy – in place between 1999 and 2002 – violated the FCRA. Under that policy, GEICO sent an "adverse action" notice only to a consumer whose insurance premium, which GEICO calculated in part by considering the person's credit score, turned out to be higher than the premium that would have been charged if the person had what GEICO considered to be an "average" credit score.

In rejecting this "adverse action" policy as plainly inconsistent with the requirements of the FCRA, the Ninth Circuit explained:

> The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice

> to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.
>
> FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's.

435 F.3d at 1092-93.

This decision is plainly correct. The FCRA requires that an "adverse action" notice be sent to any consumer whose insurance premium is adversely affected by the insurance company's use of his or her credit information. There is absolutely no basis in the statute for a policy that reduces the number of "adverse action" notices to be sent to consumers by artificially comparing the premium a consumer was actually charged after considering his or her credit score and the premium he or she would have been charged if he or she had an "average" credit score.

II. THE POLICY OF CONSUMER PROTECTION UNDERLYING THE FCRA REQUIRES A LIBERAL INTERPRETATION OF "WILLFUL NONCOMPLIANCE"

A Congressional policy of consumer protection lies at the heart of the FCRA, which was expressly enacted to fulfill "a need to ensure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681; *see also St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 883 (5th Cir. 1989) (FCRA the product of Congressional concern over abuses in the credit reporting industry). This need has only become greater over time, as the use of consumer credit information has expanded dramatically beyond the banking system to affect consumers in such critical areas as insurance, employment, and housing. *See, e.g.*, Michael Epshteyn, *The Fair and Accurate Credit Transactions Act of 2003: Will Preemption of State Credit Reporting Laws Harm Consumers?*, 93 Geo. L.J. 1143, 1150 (2005).

As one commentator has put it:

> [T]he FCRA provides a comprehensive system for regulating the dissemination and use of credit information, addressing both the permissible activities of those who utilize credit information as well as their responsibility to ensure the accuracy of the data they employ. The system is not without tension, however, between the needs of consumers, who are the primary subjects of the credit reporting system (but not its principal paying customers), and the requirements of the

> lenders, furnishers, and credit bureaus, who rely on the system for their day-to-day business operations. Consumers' paramount concern is likely to be the accuracy of their files, especially given the significance of credit reports in securing loans, housing, and employment. By contrast, creditors and credit reporting agencies, who deal with millions of credit reports each day, might be willing to sacrifice some measure of accuracy in exchange for speed and low cost.

Id. at 1149-50.

The cost of inaccuracies in credit reports is high for consumers, who may be denied products or services altogether on the basis of inaccurate information, or who may be subject to higher rates for products and services, like insurance, that are priced based on some calculated perception of the consumer's risk ("risk-based pricing"). *See* Fed. Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 (2004) at 11.

A case in point is that of James Fry, a Delaware citizen who contacted the Insurance Commissioner after receiving notice of a proposed annual increase in his homeowner's insurance premium that he believed to be inordinately high. *See* Del. Ins. Commr. and Dept. of Ins. Press Release, Oct. 25, 2005, *available at* http://www.state.de.us/inscom/departments/news/102405-Press-Hartford.shtml. When Mr. Fry asked the insurance company for an explanation of the rate increase, he was told that $43 of the $226 increase was a result of expanded coverage. The remainder, he was told, was the result of his having been placed in a higher-priced

"rating tier" based on his credit score. *Id.* After investigation, it was discovered that the insurance company had not correctly used its own credit scoring formula in Mr. Fry's case. *Id.* While the company had used negative credit factors to assign policyholders to a higher risk category, it was failing to use the positive factor of not having any outstanding credit card or loan balances to assign policyholders to a lower risk category. *Id.* Mr. Fry had no outstanding balances on his credit report, but this fact was not counted in his favor when his rate was calculated. *Id.* He ultimately received a $180 credit for the premium he overpaid as a result of the flawed calculation. *Id.* Moreover, approximately 1,400 other policyholders in Delaware received credits or refunds totaling $135,000 from the same insurer to correct errors resulting from incorrect use of their credit scores. *Id.*

Because the FCRA was enacted with the goal of protecting consumers like Mr. Fry and promoting the accurate and responsible use of their credit information, the provisions of the Act should be interpreted liberally in favor of providing consumers with the requisite notice when the prices they are being charged or quoted are adversely affected because of their credit information. *See Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 964 (6th Cir. 1998); *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Accordingly, the Court should interpret § 1681n to impose a burden of compliance on users of consumer credit information that is commensurate with the expansive and "vital role," 15 U.S.C. § 1681(a)(3), they now play in both the national economy and the lives of individual consumers. "Willful" noncompliance within the meaning of § 1681n should be held to include not only policies or actions that knowingly contravene consumers' rights under the FCRA, but also policies or actions that recklessly disregard those rights. *See Reynolds*, 435 F.3d at 1098-99 (citing *Cushman*, 115 F.3d at 227).

III. THE FCRA SHOULD BE CONSTRUED TO PROVIDE APPROPRIATE INCENTIVES FOR USERS OF CREDIT INFORMATION TO RESPECT AND PROTECT THE RIGHTS OF CONSUMERS

The Congressional statement of purpose in the FCRA recognizes the danger that fairness and equity to consumers will be subjugated to the enormous commercial demand for consumer credit and other personal information. *See* 15 U.S.C. § 1681(b). To prevent the information needs of businesses from taking precedence over the personal needs of consumers, Congress required consumer reporting agencies to "adopt reasonable procedures" for assuring compliance "with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." *Id.*

Such a burden is particularly necessary with regard to the requirement of providing an "adverse action" notice to consumers when the prices they are being charged or quoted have been adversely affected by their credit information or their credit score. Although, as in Mr. Fry's case, an unusual increase in an insurance premium and a determined consumer may bring errors or noncompliance to light, noncompliance with the "adverse action" notice requirements will more typically be difficult to identify because, by definition, those consumers affected by a credit user's noncompliance will *not* have received a notice.

Petitioner Safeco argues, however, that, in requiring the adoption of merely "reasonable" procedures, Congress intended to impose nothing more than a negligence standard on any violator of the FCRA who is not a "true malefactor." Safeco's Br. at 32-33. It argues that the Ninth Circuit's

decision would impose the enhanced remedies of § 1681n on "companies that simply guess wrong" about the scope of their obligations under the Act. *Id.* at 33. This view is incorrect.

First, the Ninth Circuit made clear that a defendant would not be liable under § 1681n "if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute." 435 F.3d at 1099.

Second, and perhaps more importantly, the "grave responsibilities" that Congress concluded credit reporting agencies and users of consumer credit information bear to act fairly and to respect the rights of consumers plainly do not permit these sophisticated commercial enterprises to "guess" about the scope of their obligations under the FCRA. The strong language Congress chose to describe how credit reporting agencies and users of credit information might protect themselves from liability demonstrates that Congress intended to impose a burden on these businesses that was commensurate with their "grave responsibilities" of fairness, accuracy and respect for consumer rights. Thus, consumer reporting agencies are required to follow reasonable procedures "to assure maximum possible accuracy." 15 U.S.C. § 1681e(b). A user of credit information can be excused for failure to send the required "adverse action" notice if it demonstrates that it had reasonable procedures in place "to assure compliance" with the requirements of the statute. *Id.* § 1681m(c). Congress did not say "reasonable procedures to promote substantial compliance." It said "to assure compliance." Guessing is not allowed.

Over the three decades since the enactment of the FCRA, the Act's promise of fairness and equity to consumers in the credit reporting process has not been fulfilled. Studies designed to evaluate rates of error in consumer reports have consistently shown that failure to comply with the FCRA's requirements concerning the fair and accurate reporting and use of consumer credit information is a serious and ongoing problem. For example, a study conducted by the U.S. Public Interest Research Group in 2004 found that one in four (25%) of the consumer reports surveyed contained "serious" errors that could result in the denial of credit or other adverse consequences. *See* Fed. Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 (2004) at 23. Over half (54%) of the consumers responding to the survey reported finding inaccurate personal identifying information in their reports, including name misspellings, incorrect birth dates, out-of-date addresses listed as current, and incorrect addresses. *Id.* Over a fifth (22%) of consumers reported that a mortgage or other loan appeared twice. *Id.* Almost a third (30%) said that their reports listed as open an account that they claimed had been closed. *Id.* In all, nearly eight in ten (79%) of the consumer reports surveyed contained an error of some kind. *Id.*

Abuses and inaccuracies in the credit reporting system remain rampant. In light of the persistence of such abuses and inaccuracies, the FCRA should be interpreted to create appropriate incentives for the users of credit information to treat consumers fairly, use and report their credit information accurately and responsibly, and adopt policies and procedures that will assure compliance with the statute. The Ninth Circuit's decision does that – in ways that are consistent with Congress' purpose and intent in enacting the FCRA.

Exposing those whose chosen policies or actions recklessly disregard the rights of consumers to damages for willful noncompliance under § 1681n will motivate compliance and encourage credit information users to maintain the proper balance between their business needs and the needs and rights of consumers. This motivation is especially important given the tremendous imbalance of power, sophistication and resources that exists between the businesses that sell and use consumer credit information and individual consumers. Balancing the needs of credit information users and the rights of consumers in an economic environment in which the resources of credit information users greatly exceed those of individual consumers requires placing a high burden on information users to "exercise their grave responsibilities," 15 U.S.C. § 1681(a)(4), in compliance with the FCRA.

CONCLUSION

For the reasons stated above, the decisions of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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0314

FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-84 and 06-100

IN THE

Supreme Court of the United States

SAFECO INS. CO. OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

GEICO GENERAL INSURANCE CO., ET AL.,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* MORTGAGE INSURANCE COMPANIES OF AMERICA AND CONSUMER MORTGAGE COALITION IN SUPPORT OF PETITIONERS

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November 13, 2006

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INTEREST OF *AMICI CURIAE*[1]

Mortgage Insurance Companies of America (MICA) and Consumer Mortgage Coalition (CMC) represent the interests of companies that issue mortgage insurance and make mortgage loans, respectively. Their members, accordingly, play a leading role in facilitating homeownership in America. Because both the premium charged for mortgage insurance and the terms of mortgage loans may depend in part on information about the potential homeowner's creditworthiness, the members of MICA and CMC – and the cause of expanded homeownership that they serve – have a strong interest in the Fair Credit Reporting Act (FCRA) issues presented in these cases.

MICA is a trade association that represents the private mortgage insurance industry in the United States. Its members provide private mortgage insurance to mortgage lenders that protects the lender if the homeowner defaults on the loan. Mortgage insurance allows those lenders to make low-downpayment loans, thereby expanding homeownership opportunities and enabling millions of Americans to become homeowners. The private mortgage insurance industry insures over five million mortgages nationwide.[2]

CMC is a trade association of national mortgage lenders, servicers, and service providers. Those lenders make mortgage loans to Americans when they purchase or refinance homes; collectively, CMC's members make or are involved in facilitating millions of home loans each year.

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[1] Written consents of all parties have been filed with the Clerk of Court. This brief was authored solely by counsel for MICA and CMC, and no person or entity other than MICA and CMC, their members, or their counsel made any monetary contribution to the preparation or submission of the brief.

[2] All but one of the seven predominant companies in the industry are members of MICA.

CMC is committed to the proper interpretation and application of consumer mortgage laws and regulations, in order to foster homeownership through efficient and effective lending practices.

Members of MICA and CMC have been named as defendants in numerous putative class actions brought under FCRA.[3] These cases generally concern statutory questions of first impression and seek an award of unlimited statutory and punitive damages for an alleged willful violation of the Act's requirements. The Ninth Circuit's decision on certiorari here casts a dark shadow both over those many cases and over *amici*'s practices and procedures. For all of these reasons, MICA and CMC have a substantial interest in the outcome of the cases under review.

SUMMARY OF ARGUMENT

The Ninth Circuit launched from the erroneous premise that FCRA is a one-sided consumer protection statute where imposing more burdens and greater liability on business are presumptively favored. To the contrary, the Act affirmatively seeks to promote the nation's strong interest in the efficient flow and use of consumer information – an interest that is vitally important to the housing industry as well. Congress thus adopted a balanced approach that carefully limits both the availability of damages and the Act's notice requirements, in order to avoid undue interference with the flow and use of consumer information. The Ninth

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[3] See, *e.g.*, *Glatt v. PMI Group, Inc.*, No. 2:03-CV-00326-JES (M.D. Fla.); *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04-CV-00004-JHM (W.D. Ky.); *Preston v. Mortgage Guar. Ins. Corp. of Milwaukee*, No. 5:03-CV-111-Oc-10GRJ (M.D. Fla.); *Price v. United Guar. Residential Ins. Co.*, No. 3:03-CV-2643-R (N.D. Tex.); *Portis v. Gen. Elec. Mortgage Ins. Corp.*, No. 04-CV-300 (N.D. Ill.); *Brantley v. Republic Mortgage Ins. Corp.*, No. 04-CV-805 (D.S.C.); *Karwo v. CitiMortgage, Inc.*, No. 04-CV-1944 (N.D. Ill.); *Frye v. Chase Home Mortgage Corp.*, No. 05-825 (W.D. Ky).

Circuit's faulty interpretations of the Act's standard for imposing statutory and punitive damages and of its adverse action notice provisions contravene the balance that Congress struck and should be reversed.

The Ninth Circuit's distorted interpretation of the test for statutory and punitive damages is not just wrong, but would impose grave and unjustifiable burdens on mortgage lenders and insurers and, indirectly, on prospective homeowners. That diffuse and wholly subjective standard would afford no reliable protection to companies subject to the Act and would drive them to adopt overly cautious approaches to the use of consumer information. That effect would be especially powerful both because mortgage lenders and mortgage insurers engage in millions of transactions annually, thereby potentially exposing them to massive damages under the ruling below, and because many issues concerning the application of FCRA to mortgage loans and mortgage insurance remain unanswered. The result would be a restricted flow of consumer information, a consequent decline in the use of such information in ways that help consumers, and a sharply reduced availability of the kinds of risk-priced mortgage loans and mortgage insurance that facilitate homeownership.

The Ninth Circuit's interpretations of the adverse action provisions are likewise both wrong and dangerous. Not only does the Act not require a company to try to compare a consumer to the hypothetical most creditworthy billionaire, but – as an even more basic threshold matter – the duty to give notice upon an "increase" in a charge plainly does not apply to an *initial* charge for a new loan or mortgage insurance policy. The Ninth Circuit's contrary readings would impose needless burdens on users of credit information and cause unnecessary confusion for consumers, all contrary to the Act's goals. This Court, in any event, should limit its ruling on the meaning of adverse action to the particular facts at issue here. Consumer information is used in different ways by different industries, depending on their unique facts

and circumstances. The mortgage industry, for example, does not use consumer information in the same way as petitioners. These variations strongly counsel against broad pronouncements, particularly given the plethora of litigation pending against *amici*'s members and other companies.

ARGUMENT

I. FCRA IS A BALANCED STATUTE THAT SHOULD BE INTERPRETED IN ACCORDANCE WITH ITS PLAIN LANGUAGE AND EVENHANDED OBJECTIVE, NOT BY SUBSERVIENCE TO AN ALLEGED "CONSUMER PROTECTION" PURPOSE

The Ninth Circuit's decision is grounded on the erroneous premise that FCRA should be interpreted in a lopsided manner because "FCRA is a consumer protection statute." 435 F.3d at 1092. The court specifically pointed as justification for its rulings that the outcomes advanced "the statutory mandate of ensuring that consumers are notified when their credit information has been used against them." *Id.* at 1099; see also *id.* at 1091-92 ("Congress sought to promote the rights of consumers"). From that foundation, the court determined, *inter alia*, that (i) adverse action notices must be sent as to new insurance policies, (ii) the statute is triggered even where the consumer's policy rate is no worse than if her credit information had not been used, (iii) the statute is triggered even where there is no credit information on the consumer at all, (iv) companies not even involved in underwriting and rate setting could be held liable, and (v) willfulness could rest on proof of mere reckless disregard of the law and could be shown by evidence that the legal compliance advice was too "creative" for the taste of a court or jury.

The Ninth Circuit's basic premise was faulty and led the court to the wrong results. As we now show, (A) Congress recognized and sought to promote a strong federal interest in the free and efficient flow of consumer infor-

mation, and (B) FCRA codifies a balanced and evenhanded approach designed to avoid undue interference with that strong interest.

A. FCRA Seeks to Promote the Efficient Flow and Use of Consumer Information by Businesses, Which is Vital to the Housing Industry in Particular and to the Economy as a Whole

Recent advances in technology have dramatically affected the consumer reporting industry.[4] The computerization of records, development of the Internet, and ability to transmit data electronically have enabled the timely flow of information about consumer accounts to consumer reporting agencies, and then from those agencies to numerous kinds of entities whose operations are enhanced by the use of that information.[5]

This flow of consumer information among businesses is vital to the United States economy. In passing FCRA, Congress found that our "banking system is dependent upon fair and accurate credit reporting." 15 U.S.C. § 1681(a)(1). It also further found that consumer reporting agencies "have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." *Id.* § 1681(a)(3). In short, "Congress enacted the FCRA in 1970 to," *inter alia*, "promote efficiency in the Nation's banking system ...." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

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[4] S. Rep. No. 185, 104th Cong., 1st Sess. 18 (1995) ("the credit reporting industry has grown in the wake of information technology advances that have occurred over the last twenty years").

[5] R. Avery *et al.*, An Overview of Consumer Data and Credit Reporting, Federal Reserve Bulletin at 49 (Feb. 2003) (estimating that each consumer reporting agency receives more than two billion items of information each month) (www.federalreserve.gov/pubs/bulletin/ 2003/0203lead.pdf).

FCRA facilitates and encourages the efficient flow of consumer information in multiple ways. Congress authorized consumer reporting agencies to disclose consumer information to various public and private entities in numerous circumstances. 15 U.S.C. § 1681b. It directed companies that maintain information about consumer accounts to furnish such information to consumer reporting agencies in an accurate manner. *Id.* § 1681s-2. Congress also preempted state laws that interfere with FCRA's key provisions. *Id.* § 1681t(b).

The nationwide system created by Congress provides considerable benefits to business and consumers alike. The Federal Trade Commission (FTC) has noted that "[t]his flow of information [permitted under FCRA] enables credit grantors and others to make more expeditious and accurate decisions, to the benefit of consumers."[6] Among the benefits conferred by the rapid sharing of consumer information are nearly instantaneous qualification for mortgage, automobile, and retail credit, higher levels of home ownership, and increased availability of non-mortgage credit for low-income households.[7] According to Congress, these benefits have saved consumers as much as $100 billion annually.[8]

B. In Recognition of that Strong Interest, FCRA Codifies A Balanced Approach Designed to Avoid Undue Interference with the Flow and Use of Consumer Information

Given Congress's strong interest in promoting the flow and use of consumer information by business, the Ninth Circuit fundamentally erred in construing FCRA so as to

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[6] Federal Trade Comm'n, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003, at 1 (Dec. 2004) (www.ftc.gov/reports/facta/041209factrpt.pdf).

[7] H. Rep. No. 263, 10th Cong., 1st Sess. 23 (2003).

[8] *Id.*

promote a one-sided policy of consumer protection. FCRA "seeks to *balance* the needs of consumers and businesses" with respect to the use of consumer information. S. Rep. No. 209, 103rd Cong., 2d Sess. (1993) (emphasis added); see also *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045 (7th Cir. 2005) (FCRA is an "attempt to achieve this balance between consumer privacy and the needs of a modern, credit-driven economy"); *Equifax Inc. v. FTC*, 678 F.2d 1047, 1049 n.3 (11th Cir. 1982) ("Congress made clear that FCRA was intended to be a balanced regulatory scheme").

The adverse action and civil liability rules are emblematic of this balance. While notice of adverse action is required in a variety of circumstances, it may be given in oral, written or electronic form; it need not be given contemporaneous with the action itself; it need only refer the consumer to the appropriate consumer reporting agency for further information; and FCRA does not require the creditor or insurer to explain the decision or adverse action in detail. 15 U.S.C. § 1681m(a). The civil liability provisions also are measured in certain respects. Unlike many aspects of federal laws regulating consumer transactions, FCRA is not a strict liability statute.[9] No liability arises under FCRA for innocent or non-negligent violations (15 U.S.C. §§ 1681n, 1681o), nor is there a private right of action attached to several of its provisions (*id.* §§ 1681d(c), 1681g(e)(7), 1681m(h)(8)(A), 1681s-2(c)).[10] On the other hand, unlike most federal stat-

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[9] Compare 15 U.S.C. § 1640 (Truth in Lending Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act); 15 U.S.C. § 1693m (Electronic Funds Transfer Act); 15 U.S.C. § 1667d (Consumer Leasing Act); 15 U.S.C. § 2310(d) (Magnuson Moss); 15 U.S.C. § 1691e (aspects of Equal Credit Opportunity Act); 12 U.S.C. § 2605(f) (aspects of Real Estate Settlement Procedures Act).

[10] Congress repealed the private right of action for liability under FCRA § 1681m when it enacted the Fair and Accurate Credit Transactions Act on December 4, 2003. Pub. L. No. 108-159, as

utes regulating consumer transactions involving credit and insurance, uncapped statutory and punitive damages are available for a willful violation of FCRA. *Id.* § 1681n.[11]

In sum, while *amici* certainly acknowledge that FCRA contains protections that benefit consumers, the Ninth Circuit plainly proceeded from an improper premise in assuming that FCRA should be liberally construed in favor of the consumer plaintiff in order "to further its objectives." 435 F.3d at 1092. The proper analysis should recognize that FCRA is a balanced statute, not a one-sided one.

II. THE NINTH CIRCUIT'S DISTORTED INTERPRETATION OF THE STANDARD FOR PUNITIVE AND STATUTORY DAMAGES UNDER FCRA WOULD IMPAIR THE EFFICIENT FLOW OF CONSUMER INFORMATION, CONTRARY TO A CENTRAL GOAL OF THE ACT

Under the decision below, a company can be deemed to have acted "willfully" – and thus ordered to pay massive classwide statutory and punitive damages – if its interpretation of its obligations on an issue of first impression under FCRA is later deemed by a jury, district judge, or appellate court to have been "implausible" or based on "creative lawyering."

As the contrary decisions of other circuit courts show and as petitioners' briefs confirm, the Ninth Circuit's construction is patently wrong under the principles of statutory construction. As we now show, that construction must also be rejected because it would defeat the Act's core balance by sharply impeding the efficient flow and use of consumer information by businesses. This is so because (A) this amor-

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codified in 15 U.S.C. § 1681m(h)(8)(A); see *Perry v. First Nat'l Bank*, 459 F.3d 816, 819-23 (7th Cir. 2006) (so holding).

[11] Compare, *e.g.*, 15 U.S.C. § 1640 (Truth in Lending Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act).

phous and diluted test provides no reliable protection against massive liability and thus would force companies to adopt approaches to consumer information that are excessively cautious; (B) that effect would apply not just to "adverse action" in the context at issue in these cases, but to the Act's many other provisions and across a wide swath of the American economy; and (C) this effect will be especially pernicious because many issues raised by FCRA, a complex and highly technical statute, remain unresolved.

A. The Ninth Circuit's Construction Would Undermine the Act's Goals

A standard under which massive classwide statutory and punitive damages may be awarded based on an after-the-fact appraisal that the company's position on a legal issue of first impression was not sufficiently "tenable," or that its lawyers' advice was too "creative," would defeat rather than promote the Act's core purposes in multiple respects. First, such a subjective and amorphous standard would drive companies to adopt overly cautious policies, thereby sharply constricting the flow and use of consumer information. Companies such as *amici*'s members are faced with a host of obligations under FCRA, both as "users" of information received from consumer reporting agencies and as "furnishers" of information to consumer reporting agencies. 15 U.S.C. §§ 1681b, 1681g(g), 1681i, 1681m, 1681s-2, 1681s-3. There is simply no way that a company can know, in advance, whether its position as to the meaning of any of the multitude of these requirements might later be found to be "implausible," insufficiently "tenable," or "unreasonable" – because those terms are wholly subjective and so provide no guidance to industry. Indeed, the fact that the district court agreed with the defendants' legal position as to adverse action, but that the Ninth

Circuit nevertheless held that its standard for statutory and punitive damages may be met, proves this point.[12]

The Ninth Circuit's standard, thus, would leave businesses with no reliable protection against runaway statutory and punitive damage awards. This is particularly troubling given the fact that many companies engage in millions of transactions affected by FCRA annually (or even monthly) and hence are tempting targets of class action cases seeking massive awards, even in the absence of any actual harm. In *amici*'s experience, companies would be pressured by such a standard to adopt the most cautious possible reading of each of the Act's various requirements. This inevitably would lead to less use, and less efficient use, of consumer information, expensive and unnecessary measures to avoid post-hoc criticism of compliance efforts, and hesitation on other aspects of statutory questions. Those effects, in turn, would defeat the Act's goal of fostering the flow and use of consumer information. In short, driving businesses to adopt the most cautious possible approach eviscerates the statutory balance that Congress enacted.[13]

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[12] Both the rules of statutory construction and constitutional principles render impermissible the kind of vague test for punitive damages adopted by the Ninth Circuit. Under the rule of lenity and similar principles, statutes that authorize punishment, including in the form of punitive damages, must be narrowly construed. See, *e.g.*, 3 N. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 58:4 at 99 (6th ed. 2001) ("[h]ighly regulatory statutes are strictly construed so that those covered by the statute have clear notice of what conduct the statute proscribes"). Due process, moreover, prohibits punishment absent clear advance notice of the proscribed conduct. See, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment") (citation omitted).

[13] This Court in other contexts has rejected statutory interpretations "courting intolerable risks of chilling legitimate"

Second, the Ninth Circuit's interpretation would undermine the attorney-client privilege and, in doing so, would weaken rather than enhance compliance with the Act's substantive requirements. As the Ninth Circuit unabashedly acknowledged, its "reckless disregard" standard will routinely put at issue "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." 435 F.3d at 1099. Indeed, given the risk of catastrophic statutory and punitive damages in nationwide class action cases, mortgage insurers, lenders and other defendants may, as a practical matter, have to disclose the privileged advice they received in an effort to defend themselves. As such, the Ninth Circuit's approach contravenes the strong public interest in protecting attorney-client communications. See, *e.g.*, *Upjohn v. United States*, 449 U.S. 383 (1981); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

The pressure on the privilege arising in FCRA class actions is enormous. FCRA permits the award, in the case of a willful violation, of statutory damages of $100 to $1000 per violation plus punitive damages, all without upper limit, in addition to actual damages and attorneys' fees. 15 U.S.C. § 1681n. The attraction of such a bonanza has led virtually every plaintiff in FCRA class action lawsuits to seek such an award. *Amici*'s members are large institutions, and potential class sizes in cases against them and others are in their industry run into the hundreds of thousands (or even more). As a consequence, it is not unusual that potential liability in FCRA class action cases is in the hundreds of millions of dollars. The Ninth Circuit's cavalier comments that suggest that attorneys should be testifying, and the privilege waived, puts industry participants in an untenable position in these potentially massive lawsuits.

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conduct. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993).

The experience in the lower courts already has demonstrated the pernicious impact of the Ninth Circuit's ruling on the attorney-client privilege. In a case related to the cases at bar, the district court whose rulings were reversed by the Ninth Circuit's decision under review here has recently held that "advice of counsel" is a defense that must be pled, and the privilege waived, if the insurer hopes to defeat the contention that its violation of FCRA was willful. *Ashby v. Farmers Ins. Co. of Oregon*, No. CV 01-1446-BR (D. Or. Feb. 28, 2006) ("The [Ninth Circuit] opinion ... leaves open the possibility, albeit by a small margin, that an insurer might be able to establish it did not act willfully ... if the formulation of the notice was based on advice of counsel."). Further, in *White v. E-Loan, Inc.*, 2006 WL 2850041 (N.D. Cal. Oct. 25, 2006), the court denied the defendant's motion to stay discovery regarding willfulness, pending resolution of the threshold issue of whether FCRA was violated at all, thereby – due to the Ninth Circuit's decision – potentially requiring the defendant to waive attorney-client privilege before the merits are even litigated.

Experience arising from over 100 FCRA class actions filed in the Northern District of Illinois in the last two years alone is also instructive on this point. Those cases concern whether creditors violated FCRA § 1681b in how they made unsolicited "firm offers of credit," as permitted by the statute. In several of those cases,[14] defendants have stipulated to a partial waiver of the attorney-client privilege, faced with plaintiffs' contention that the Ninth Circuit's decision requires such a waiver in order to defend oneself from a will-

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[14] See, *e.g.*, *Murray v. GMAC*, No. 05-CV-1229; *Cerda v. First NLC Financial Services, LLC*, No. 06-CV-0735; and *Hernandez v. CitiFinancial Servs., Inc.*, No. 05-CV-2263.

fulness claim. In short, the dangerous consequences of the Ninth Circuit's ruling are already evident. [15]

Moreover, by putting such advice routinely at issue, the ruling below not only will force disclosure of privileged advice but is likely to discourage clients from seeking, and lawyers from providing, frank and thoughtful advice with respect to FCRA compliance – lest such advice later be used against the client as proof of the kind of "creative lawyering" that, under the Ninth Circuit's approach, justifies the imposition of exemplary damages on a defendant.[16] Alternatively, companies may be well advised to get second and third opinions, hoping that if several lawyers agree the advice might look better to the trier of fact. Rather than motivating companies to "seek objective answers from their counsel as to the true meaning of the statute" (435 F.3d at 1099), the Ninth Circuit's statutory construction would undermine forthright legal advice and true compliance with the Act.

Last, still further problems will arise from the Ninth Circuit's assertion (*id.*) that even consultation with attorneys and reliance on their advice may not suffice to avoid a finding of willfulness if a court concludes in hindsight that the

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[15] Notably, a district judge in that court recently permitted a defendant to seek summary judgment as to willfulness without waiver of the privilege and granted the motion over plaintiffs' objection that the substance of the advice should have been disclosed. *Murray v. HSBC Auto Finance, Inc.*, 2006 U.S. Dist. LEXIS 74128 (N.D. Ill. Sept. 27, 2006). But the controlling legal standard of willfulness in the Seventh Circuit is not the Ninth Circuit's, but instead properly requires the much higher level of proof of intentional misconduct. *Wantz v. Experian Inf. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004).

[16] Compare *Upjohn*, 449 U.S. at 389 (the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice").

lawyers provided "indefensible answers." That holding put clients in the impossible situation of having to second-guess all of their attorneys, still further undermining both the privilege and compliance. It can safely be said that Congress never intended such a result when it enacted Section 1681n.

B. These Untoward Effects Would Be Felt Throughout the Statutory Scheme

Because statutory and punitive damages are available for the willful violation of *any* of the Act's requirements, and because the Act contains numerous requirements that affect a broad swath of the economy, these untoward effects will be particularly sweeping. Except where private suits are barred, FCRA authorizes such an award against "[a]ny person who willfully fails to comply with *any* requirement" of FCRA. 15 U.S.C. § 1681n(a) (emphasis added). That means that these problematic consequences will be felt throughout all of the Act's terms and across the many industries that it impacts.

As noted above, FCRA imposes a variety of substantive duties beyond the adverse action notice provisions that the Ninth Circuit considered. Section 1681b sets forth permissible purposes for which consumer reporting agencies may furnish, and third parties may receive, consumer report information. Sections 1681c, 1681, and 1681i impose requirements with respect to the types of information that a consumer reporting agency may include in a consumer report, how consumer reporting agencies must disclose such information to consumers, and how disputes over accuracy are resolved by such agencies and by information furnishers. Section 1681m imposes duties on users of information in consumer reports in certain circumstances. And Section 1681s-2(b) provides procedures for investigations by entities that furnish consumer information into certain disputes over the accuracy of consumer information.

The Act's provisions also are not limited to the use of credit information, which was at issue in these cases. The

duties imposed by FCRA arise from the use of information in "consumer reports," a term that Congress defined to include not only credit information, but also "any information ... bearing on a consumer's ... character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d)(1). That definition has been construed to include such data as driving record information,[17] social security numbers, and even nicknames.[18]

Thus, the Ninth Circuit's interpretation of the word "willfully," if adopted, would affect much more than just the adverse action notification requirements of Section 1681m that are at issue in these cases. Approximately 250 cases have recently been filed, in courts spread out among many circuits, in which plaintiffs are seeking statutory and punitive damages on the ground that creditors and insurers did not make firm offers of credit or insurance under § 1681b.[19] A number of other class actions contend that creditors or insurers failed to send adverse action notices at appropriate times or challenge the sufficiency of notices that were sent.[20]

The Act's terms, moreover, broadly affect much of the economy. FCRA imposes obligations on consumer reporting agencies, on companies that furnish information to consumer reporting agencies and, in certain circumstances, on users of information contained in consumer reports. Thus,

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[17] See FTC Staff Letter from W. Haynes to M. Halpern, June 11, 1998 (http://www.ftc.gov/os/statutes/fcra/halpern.htm).

[18] See *Yang v. GEICO*, 146 F.3d 1320 (11th Cir. 1998).

[19] See, *e.g.*, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006); *Putkowski v. Irwin Home Equity Corp.*, 2006 WL 741387 (N.D. Cal. Mar. 23, 2006); *Pearson v. Novastar Home Mortgage, Inc.*, No. 05-1377-A (M.D. La. Mar. 28, 2006).

[20] See, *e.g.*, *Broessel v. Triad Guar. Ins. Corp.*; *Brantley v. Republic Mortgage Ins. Corp.*; and *Whitfield v. Radian Guar., Inc.*, all cited in note 3 *supra*.

although petitioners in these cases are personal lines insurers, consumer information is used by a wide array of lenders, retailers, employers, and government agencies.[21]

The same is true throughout the housing industry. First, insurance companies that write homeowners insurance policies frequently use the homeowner's credit scores in determining the premiums for such insurance.[22] Second, most mortgage lenders use the prospective homeowners' credit information in underwriting the risks of mortgage loans and determining the interest rates and other terms for those loans.[23] Finally, credit information may also be used in connection with the private mortgage insurance issued by MICA's members. The premium charged to the lender by the mortgage insurer is based on a variety of factors, including, in certain types of mortgage insurance policies, information contained in the homeowners' consumer reports.

C. The Effects Would be Especially Pernicious Given that Many Issues Under FCRA are Still Unresolved

The damaging impacts from adopting the Ninth Circuit's view that an "implausible" answer to a novel issue justifies an award of unlimited statutory and punitive damages would be particularly powerful because FCRA is a complicated statute with many still-unresolved issues and little regulatory guidance. As is apparent from its text, FCRA is a "complex statutory scheme." *Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003). For example, as directly applicable to these cases, the term "adverse action" is given five

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[21] See S. Rep. No. 209, 103d Cong., 2d Sess. 1-2 (1993).

[22] See, *e.g.*, S. Rep. No. 166, 108th Cong., 1st Sess. 7 (2003).

[23] *Id.*; see also General Accounting Office, Mortgage Financing: HUD Could Realize Additional Benefits from Its Mortgage Scorecard, GAO Report No. 06-435 at 5 (Apr. 2006) (discussing use of automated underwriting of loans using borrower credit scores).

separate meanings by the Act, each of which contains multiple parts. 15 U.S.C. § 1681a(k).[24] For credit transactions, FCRA incorporates another statutory scheme, the Equal Credit Opportunity Act and its governing regulations. Id. § 1681a(k)(1)(A). There is, moreover, relatively little guidance as to the proper interpretation or application of the Act's complicated provisions. The FTC, which has jurisdiction over certain of the Act's provisions, has no general authority to issue substantive rules under the Act (see 15 U.S.C. § 1681s(a)(1), (e); 65 Fed. Reg. 80803 (Dec. 22, 2000)) and, since 2001, has not even issued informal interpretive letters (see http://www.ftc.gov/os/statutes/fcrajump.htm). Revised commentary on FCRA, promised by FTC in early 2003, is still forthcoming. Federal banking agencies have certain regulatory authority for entities they regulate (15 U.S.C. § 1681s(e)), but have not chosen to exercise that authority in many instances. Notably, three years ago, Congress enacted the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Pub. L. No. 108-159, a lengthy statute that revised many of FCRA's existing provisions and added numerous new statutory terms, but many of the regulations that Congress required for implementing these new provisions have yet to be issued.

Not surprisingly, given the Act's complexity and limited guidance, numerous issues concerning the Act's interpretation and application remain unresolved. In the instant cases, for example, the Ninth Circuit considered, admittedly as a "matter of first impression," whether an initial charge is properly considered an "increase in any charge" and hence can constitute an "adverse action." 435 F.3d at 1090. In rul-

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[24] Because FCRA thus is a highly technical statute, the term "willfully" must be construed as requiring actual knowledge that the law is being violated. See *Cheek v. United States*, 498 U.S. 192 (1991) (tax code); *Ratzlaf v. United States*, 510 U.S. 135 (1994) (currency transactions reporting act).

ing that it is, the court rejected prior district court rulings, including the ones in the cases on appeal.[25] The Ninth Circuit also considered, again for the first time, whether an "adverse action" can have occurred when the use of credit information resulted in the consumer receiving a better rate than if credit information has not been considered at all. On this new issue, too, the appeals court rejected the district court's ruling. 435 F.3d at 1092-93.

Similarly, even the most basic issues relating to the Act's application to mortgage insurance remain unresolved. For example, the duties that apply in the event of an "adverse action" depend in part on which of the five prongs of the "adverse action" definition applies. 15 U.S.C. § 1681a(k). Mortgage insurance arises as part of a credit transaction: when a prospective homeowner seeks credit in the form of a mortgage, the lender as part of that credit transaction obtains mortgage insurance in order to insure against the risk it would face if the borrower defaults on a loan and the value of the home is insufficient to pay the amount of the outstanding mortgage. Because mortgage insurance is an integral part of a transaction in which a consumer is obtaining credit, a reasonable construction is that the so-called "credit" prong applies to mortgage insurance. *Id.* § 1681a(k)(1)(A). Advocates in cases against MICA's members have argued, however, that the definition of adverse action applicable to the "underwriting of insurance" applies instead. *Id.* § 1681a(k)(1)(B)(i). This unresolved question is crucial: if the credit transaction definition applies, a mortgage insurer is not required to send adverse action notices in circumstances where the consumer obtains the product (a loan) that he or she sought. See 16 C.F.R. pt. 698, app. H, pt. I.C ("No adverse action occurs in a credit transaction where the creditor

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[25] See, *e.g.*, *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003).

makes a counteroffer that is accepted by the consumer."), incorporated into 15 U.S.C. § 1681a(k)(1)(A).

Another area of uncertainty concerns whether adverse action notice requirements even apply to mortgage insurers. A federal district court has ruled that mortgage insurers have no duty to send notices because they contract with lenders, not consumers, and because they insure lenders' risks, not consumers' risks. *Whitfield v. Radian Guar., Inc.*, 395 F. Supp. 2d 234 (E.D. Pa. 2005), *appeal pending*, No. 05-5017 (3d Cir.). Another district court has disagreed. *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04CV-00004-JHM (W.D. Ky. Jan. 4, 2006).

In sum, the Ninth Circuit should have recognized – as many courts have – that issues of first impression do not lend themselves to the imposition of punishment or of punitive remedies.[26] Because FCRA presents many such issues, it is particularly important that the decision below be reversed.

III. THE NINTH CIRCUIT ALSO ERRED IN HOLDING THAT GEICO TOOK ADVERSE ACTION WITH RESPECT TO EDO

This Court's grant of certiorari in *GEICO* raises a second question: whether the Ninth Circuit correctly concluded that GEICO took "adverse action" under 15 U.S.C. § 1681m(a) when it issued a policy of automobile insurance to respondent Edo. The decision was premised on the twin con-

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[26] See, *e.g.*, *Harrison v. Allstate Ins. Co.*, 662 So. 2d 1092, 1095 (Miss. 1995) (no punitive damages where "[t]he issue presented in this case is one of first impression in this state" and thus defendant "had no prior notice that its revised policy was contrary to our laws"); *Flores v. Carnival Cruise Lines*, 47 F.3d 1120, 1127 (11th Cir. 1995) ("Because this is a case of first impression, Carnival did not abrogate any established legal duty toward Flores, and therefore did not exhibit willful and wanton misconduct"); *Morgan Guar. Trust Co. v. American S&L Ass'n*, 804 F.2d 1487, 1500 (9th Cir. 1986).

clusions that the insurance rate was adversely affected by Edo's credit score and that this supposed adverse effect had resulted in an increase in the charge for insurance. The Ninth Circuit erred in both respects, and *amici* write separately to explain why each conclusion is inconsistent with the text and practical realities. Before doing so, however, *amici* address the nature of adverse action notices generally.

Adverse action notices required by FCRA are quite limited. By statute, the notice need only contain two kinds of information. First, the notice must provide notice "of the adverse action." 15 U.S.C. § 1681m(a)(1). Second, it must inform the consumer of the identity of the consumer reporting agency whose consumer report was used; of the right to obtain a free copy of a consumer report from that agency; of the right to dispute anything inaccurate in the report; and of the fact the agency did not make the adverse action decision. *Id.* § 1681m(a)(2), (3). Despite the Ninth Circuit's comments to the contrary, the notice need not explain "the nature of that action" or "how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future." 435 F.3d at 1085.

The bare-bones nature of the statutory requirement is not surprising, in light of the nature of consumer report information in the modern economy. It simply is not practical to require insurers and creditors to *explain* how the use of credit information has affected the consumer. Pricing algorithms are extremely complex. And, more importantly, it is not always clear, sometimes even to the insurer or creditor, why one consumer's credit score is not as favorable as another's. Credit scores (and similar numerical expressions of consumer report information) are often influenced, at least in part, not by the existence or absence of a delinquency or a default but by the number and extent of credit relationships, recent inquiries, and other factors. That is, one's credit score could be lower than another's simply because the consumer has less experience with credit, though that experience has been

positive. While circumstances such as these illuminate why it makes sense for the adverse action notice to merely inform the consumer that an adverse action has been taken, it also means that the notice contains limited guidance.

The benefit of adverse action notices, moreover, has been reduced as a result of the enactment of FACTA. Before FACTA, the adverse action notice had the advantage of triggering for a consumer the right to obtain a free credit report, which the consumer could examine and, presumably, seek to correct. But in FACTA, Congress provided that all American consumers have the right to an annual free credit report. 15 U.S.C. § 1681m(a)(3)(A). The benefit of the adverse action notice process thus has largely disappeared.

Indiscriminately requiring adverse action notices in most credit and insurance transactions would be baffling, off-putting, and counterproductive. Where, as in the case at bar, the consumer believes and understands that she is obtaining the product or service she requested, the notice of "adverse action" is inherently confusing. Individuals who obtained consumer reports might expend considerable time with consumer reporting agencies and entities that provide credit information addressing entries in their consumer reports – not understanding that the reports accurately reported their credit accounts, or that any "errors" in the reports were sufficiently minor that their ability to obtain credit or insurance was not impaired in any material way. Consumers, who had applied for and received a policy of insurance or loan satisfactory to them, might call users who had sent them adverse action notices, puzzled about what "adverse action" they had suffered.

Mortgage insurance presents an even more difficult situation. Mortgage insurance is a default policy for the lender, and so the mortgage insurer does not even have a relationship with the consumer. If adverse action notices were required from a mortgage insurer where an issued

policy was at a less-than-optimal rate, the notice would be confusing in the extreme, coming to a consumer who probably has not even heard of the mortgage insurer and often in connection with a loan that the consumer believed was being made.

For these reasons, and others, it is not surprising that Congress did *not* enact an approach calling for the indiscriminate distribution of adverse action notices in every conceivable situation, but instead drew lines that require notices only where doing so would be useful and would outweigh the various costs. As we now show, the Ninth Circuit's rulings crossed those lines.

A. The Court Erred In Finding That An Adverse Action Notice Was Required

The Ninth Circuit's decision, requiring an adverse action notice, was erroneous because (1) there was nothing adverse to Edo and (2) the issuance of an initial insurance policy was not an adverse action.

1. GEICO had no obligation to send an adverse action notice to Edo when it issued him an initial policy of automobile insurance, because it was undisputed that use of credit report information did not make Edo's policy premium any higher. 435 F.3d at 1093 n.12. The Ninth Circuit nonetheless held that GEICO took "adverse action" because FCRA "requires [adverse action] notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score." *Id.* at 1093. This approach compared Edo with a hypothetical insured – indeed, the most creditworthy insured in the world.

That approach greatly, and erroneously, expands the scope of FCRA. The statute requires a notice where adverse action has occurred "based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a). The plain import of this requirement is to mandate

a notice to Edo only if information in *Edo's* consumer report caused him to get a higher premium rate than he otherwise would have received had his consumer report not been considered. The statute does not by its terms create the duty of notification that compares the debtor or insured with *someone else*. GEICO acted properly in not telling Edo he had been adversely affected, because he had not been.

There are practical and policy reasons why the Ninth Circuit's approach makes little sense. For the consumer, there is little utility in being told that her experience in obtaining insurance or credit is less favorable than it would have been if she was the hypothetically most creditworthy person. The Ninth Circuit's requirement of a notice "whenever a consumer pays a higher rate because his credit rating is less than the top potential score" (435 F.3d at 1093), would send consumers off to study their reports for the often-futile purpose of identifying why they are not the best credit risk – a scenario that Congress simply did not intend.

Underlying the Ninth Circuit's construction of FCRA seems to be the mistaken assumption that every consumer might be eligible for the "best" rate because she might discover errors contained in her consumer reports of sufficient magnitude to result in lower premiums if the errors were corrected. In *amici*'s experience, that simply is not the case for the products they provide: a sub-optimal premium or interest rate, or loan term, is not a reliable indicator of the need for the consumer to investigate her credit report, and there is no basis to conclude that Congress believed otherwise. Likewise, the FTC's expected litigating position supporting the Ninth Circuit should not bolster that court's conclusion. The FTC has no rulemaking authority over the adverse action provisions of FCRA (see 16 C.F.R. § 1.73(a)(2)), and thus its views are not entitled to deference. Moreover, the Commission's current stance is inconsistent with its prior actions. The FTC has never brought any reported FCRA enforcement action in this area against an insurance company even though

such companies historically have not provided such notices.[27] Further, when FCRA was amended in 2003, the FTC supported a draft amendment that would have added a new requirement that insurers send a "Risk Based Pricing Notice" telling consumers that credit might adversely affect premium pricing – an amendment that would have been unnecessary if FCRA's adverse action provisions already required notices under those circumstances.

Finally, the Ninth Circuit argued that its interpretation "best comports" with FCRA's purpose of ensuring "[a]ccuracy and fairness of credit reporting." 435 F.3d at 1091 (citing 15 U.S.C. § 1681). As noted above, however, FCRA has multiple goals and seeks to strike a balance. Requiring that users of consumer notices send out numerous adverse action notices in situations specified by the Ninth Circuit might result in benefits to some, but, as noted above, those benefits are limited and come with the cost of consumer confusion in other instances. Assume, for example, that a consumer's policy of insurance was set for renewal, an insurer obtained consumer report information to evaluate the renewal, and the consumer's credit standing had improved so that a lower premium (but still not the best) was provided at renewal. Because the new premium was not the "best" hypothetical premium available, the insurer would be required to send a notice informing the consumer that he had been provided a new, lower premium – but also that the insurer had taken "adverse action" against him based on information in his consumer report.

In sum, because it was undisputed that Edo's premium was not higher than it would have been if his score had not been used, there was no notice duty in this case.

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[27] Although risk-based pricing of insurance based upon credit reports has evolved over the last decade, other types of consumer reports, such as motor vehicle reports, have been used for many years in pricing insurance.

2. The Court of Appeals also erred in its threshold ruling that "FCRA's adverse action notice requirement appl[ies] to the rates first charged in an initial policy of insurance" and is not "limited to an increase in a rate that the consumer has previously been charged." 435 F.3d at 1090. *Amici* urge the Court to address this initial holding, which finds no support in the plain language of the statute and which if reversed would require reversal of the Ninth Circuit's judgment.

Congress provided a multi-part definition of "adverse action." The part applicable to insurance matters, the "Insurance Prong" of the definition, states as follows:

> The term "adverse action" ...
>
> (B) means –
>
> (i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i). The Ninth Circuit held that there was an "increase" in GEICO's charge for insurance to Edo, even though it had not previously issued him a policy of insurance. The reasons that the court offered for that conclusion do not withstand scrutiny.

First, the court said that the ordinary meaning of the word "increase" is "to make something greater," which it believed should not "be limited to cases in which a company raises the rate that an individual has previously been charged." 435 F.3d at 1091. Yet the definition offered by the Ninth Circuit compels the opposite conclusion. Because "increase" means "to make something greater," there must necessarily have been an existing premium, to which Edo's actual premium may be compared, to determine whether an

"increase" occurred. Congress could have provided that "adverse action" in the insurance context means charging an amount greater than the optimal premium, but instead chose to define adverse action in terms of an "increase." That definitional choice must be respected, not ignored. See *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979) ("[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated").

Next, the Ninth Circuit reasoned that because the Insurance Prong includes the words "existing or applied for," Congress intended that an "increase in any charge" for insurance must "apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy." 435 F.3d at 1091. This interpretation reads the words "existing or applied for" in isolation. Other types of adverse action described in the Insurance Prong apply only to situations where a consumer had an existing policy of insurance, such as a "cancellation," "reduction," or "change" in insurance. Each of these forms of adverse action presupposes an already-existing policy, and under usual canons of statutory construction the term "increase" also should be construed to apply to increases of an already-existing policy. See *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("a phrase gathers meaning from the words around it") (citation omitted).

The Ninth Circuit stated that it was aware of "no sensible alternative reading" of the statute other than its view that the phrase "existing or applied for" modified each part of the definition that preceded it, and permitted adverse action for all types of insurance transactions, including ones where a pre-existing relationship was lacking. 435 F.3d at 1091. However, Congress used the disjunctive in the Insurance Prong, referring to insurance "existing or applied for," and so could have intended that the term "existing" govern certain listed insurance transactions, and "applied for" govern others. Under this reading, the term "existing" would apply to "cancellation," "increase" in charge, "reduction," or "unfa-

vorable change" in terms of insurance -- all terms that presuppose an existing policy. The term "applied for" would govern "a denial" of insurance, in which a consumer lacks an existing relationship with the insurer.[28]

At bottom, the Ninth Circuit view was that FCRA should be construed in whatever manner requires sending more notices. But Congress, well aware that "[m]eaningful disclosure does not mean *more* disclosure" (*Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 243 (2004) (citation omitted)), enacted a more nuanced – and more sensible – statutory scheme. It is well settled that courts must strictly adhere to the terms of legislation that "was the result of compromise between groups with marked but divergent interests." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002); see also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 n.13 (1989) ("[s]trict adherence" to statutory language is required when statute "is the result of a series of carefully crafted compromises"). As we have shown, that is precisely the case with respect to FCRA. Under these circumstances, "the wisest course is to adhere closely to what Congress has written." *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 (1981). Because the Ninth Circuit strayed far from that course, its interpretations of the statute should be corrected.

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[28] Even if the court was right that there can be an "increase" where there was no prior charge, it could only be where an application is made for a policy or loan at a specific rate or charge and that specified rate or charge is increased, based on consumer information, before the sale. See, *e.g.*, Latour-Berger FTC Interpretive Letter (June 28, 2001) (http://www.ftc.gov/os/statutes/fcra/latour.htm). For example, a lender might indicate that it was applying for mortgage insurance at a particular rate but coverage might be granted only at a higher rate due to the consumer's credit profile. Surely, at the very least, there must be a first, lower number applied for before there can be said to have been an "increase" in the charge.

B. The Court Should Limit Its Ruling Concerning The Meaning of The Term "Adverse Action"

Whatever its decision, *amici* respectfully submit that the Court should be careful to limit its decision as to the adverse action issue to the specific factual context presented in the *GEICO* case. Several reasons counsel in favor of such a limited ruling.

Caution in the interpretation of the term "adverse action" is needed because FCRA has a broad regulatory scope. In FCRA, Congress permitted multiple different entities to use consumer information, including in connection with furnishing credit, for employment purposes, with underwriting of insurance, for eligibility for a government license of benefit, valuing the credit or prepayment risks of an existing credit obligation, and in connection with account reviews to assure that a consumer meets the terms of the account. See generally 15 U.S.C. § 1681b(a)(3).

Use of credit information arising from these multiple purposes is not monolithic, and the manner in which one industry uses consumer information will depend on facts and circumstances unique to that industry. For example, private passenger automobile insurers, such as respondent GEICO, offer one product (automobile insurance) and use a "tier" system, under which potential insureds are placed into one of multiple tiers based not only on credit information, but also on driving-related factors such as prior accidents, use of the vehicle, and vehicle type. Mortgage insurers, however, use a different approach, and pricing is impacted by the loan-to-value ratio as well as information about the proposed borrowers.[29] Lenders making mortgage loans offer borrowers a

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[29] Further, some mortgage insurance programs require that there be a credit score in order to issue a policy, unlike certain programs before the Ninth Circuit.

variety of differing loan products depending on a borrower's needs; how the consumer's credit information affects the interest rate offered will depend on a host of other factors relating to the credit product that the consumer has selected. These varied uses of consumer information further underscore the need for a narrow ruling on the term "adverse action."

Strictly limiting the scope of the Court's decision as to the meaning of the term "adverse action" is also vital in light of the stakes involved in FCRA litigation against *amici*'s members, and others. As explained above, creditors and insurers typically use consumer information in a host of different circumstances: in providing quotes to consumers shopping for rates, in evaluating applications, and in reviewing existing accounts. Because of this extensive use of consumer information, and because of FCRA's statutory penalty provision, the potential exists for very significant liability when a defendant's use of credit information is challenged in a class action setting. A narrow ruling on the term "adverse action" will help confine liability to those contexts where it is appropriately placed. *Cf. Fidelity Federal Bank & Trust v. Kehoe*, ___ U.S. ___, 126 S. Ct. 1612 (2006) (Scalia, J., concurring in denial of certiorari) (noting the "enormous potential liability, which turns on a question of federal statutory interpretation," that defendant faced in a class action under the Driver's Privacy Protection Act).

CONCLUSION

The judgments below should be reversed.

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November 13, 2006

6352

FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR, *et al.*,

Respondents.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the National Association of Mutual Insurance Companies (NAMIC) is a national trade association representing companies writing property and casualty insurance in every state and jurisdiction of the United States. NAMIC has more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property/casualty insurance premiums in the United States. NAMIC members account for 44 percent of the homeowners market, 38 percent of the automobile market, 39 percent of the workers' compensation market, and 31 percent of the commercial property and liability market. NAMIC benefits member companies through advocacy, public policy and member services. NAMIC regularly appears in judicial proceedings as an amicus to inform courts about the implication of legal developments for their members.

The issues of the interpretation and application of the Fair Credit Reporting Act (FCRA) that are before the Court in the present consolidated cases are of great importance to NAMIC's members. The Ninth Circuit's decision threatens insurance companies and other users of credit information with crushing liability that NAMIC believes is contrary to the statutory language and to Congress' intent in enacting the FCRA.

SUMMARY OF ARGUMENT

The Ninth Circuit's interpretation of key statutory provisions of the FCRA drastically expands the obligations and potential liability of insurance companies and other users of credit information under the FCRA. Under the FCRA, it is a permissible practice for insurance companies to consider

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae NAMIC states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than amicus curiae and their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have given blanket consent to the filing of all amicus briefs in this case, in letters of consent filed with the Clerk of this Court.

a consumer's credit history or other consumer information in making underwriting decisions as to whether to insure a particular risk and at what price. *See* 15 U.S.C. § 1681b(a)(3)(C). However, in certain circumstances described by the statute, an insurer is obliged to notify the consumer when it has taken an adverse action based on the consumer's credit report. The Petitioners in the FCRA class actions now before this Court are alleged to have willfully failed to comply with the statutory adverse action notice requirement. The Ninth Circuit's decision presents critical questions of statutory interpretation regarding the definition of "adverse action" in section 1681a(k)(1)(B)(i) of the Act and the meaning of "willful" noncompliance under section 1681n(a). This *amicus* brief addresses both of these issues.

The FCRA includes a number of civil penalty provisions to penalize violations of or noncompliance with the requirements of the Act. The FCRA establishes different civil penalties for "negligent," "knowing," and "willful" violations, with the most severe civil penalties, reserved for "willful" violations. 15 U.S.C. § 1681n(a). Plaintiffs who establish a willful violation need not show actual damages, but may recover statutory damages of up to $1000 per plaintiff, as well as punitive damages and attorneys' fees. *Id.*

In the decision under review, the Ninth Circuit erroneously held that "willful" noncompliance with the requirements of the Act encompasses not only a knowing and intentional failure to comply, but also "reckless disregard." *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3162 (U.S. Sept. 26, 2006) (No. 06-100). The Ninth Circuit's expansive interpretation of the statutory term "willfully" places an excessive and potentially crushing burden of liability on users and providers of credit information, facilitating and encouraging huge nationwide class actions seeking statutory and punitive damages on behalf of persons who have not suffered any actual damages from the instances of noncompliance they allege.[2]

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[2] For a discussion of the potential for "catastrophic" and "disproportionate" damages in class actions for statutory and punitive

The Ninth Circuit's primary rationale for this ruling was its belief that this Court's decisions on the meaning of "willfulness" in various other statutory contexts establish a rule that the word "willful" when used in civil statutes means reckless, while in criminal statutes the meaning is limited to knowing, intentional conduct. *Id.* at 1098. The existence of such a rule, however, is negated by this Court's decision in *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998), in which the Court held that "willful" as used in section 523(a)(6) of the Bankruptcy Code did not include the meaning "reckless," noting that if Congress had intended that meaning, it could have added the word "reckless" to the statute.

Moreover, this Court has repeatedly emphasized that the word "willful" as used in civil and criminal statutes is "'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citation omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (same). Thus, the Court has indicated that the meaning of the term "willful," whether in civil or criminal statutes, must be determined through a careful analysis of the statutory language, context and purposes. Such an analysis – which the Ninth Circuit failed to perform – demonstrates that the term "willful" as used in the FCRA was intended to encompass only intentional conduct committed with knowledge that the conduct was contrary to the requirements of the Act.

In particular, in the hierarchy of violations and civil penalties created by the FCRA (willful noncompliance, knowing noncompliance, and negligent noncompliance), only willful noncompliance carries the possibility of punitive damages. By holding that willful noncompliance does not require a showing that a defendant acted with knowledge that its conduct was unlawful, but is satisfied by a showing that the defendant acted in "reckless disregard" of the statutory requirements, the Ninth Circuit erroneously has subjected less culpable conduct to the penalties that Congress intended

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damages under section 1681n(a), *see In re Trans Union Corp. Privacy Litigation*, 211 F.R.D. 328, 348-51 (N.D. Ill. 2002).

be reserved for only the most culpable violations of the FCRA.

The Ninth Circuit's incorrect interpretation of "willful" improperly creates a dramatic expansion of liability for statutory and punitive damages under the FCRA that is inconsistent with the purposes of the statute. The FCRA was enacted to regulate and to spur the development of consumer credit markets and the use of credit information -- economic activity that Congress recognized was vital to the national economy and beneficial to both consumers and businesses. The FCRA was also intended to protect consumers by defining the permissible purposes for which a consumer's credit information may be accessed without his or her permission and by establishing procedures to ensure that credit information is accurately reported. The expansion of liability created by the Ninth Circuit's decision impairs the balance struck by Congress as best furthering these statutory purposes.

The Ninth Circuit's interpretation and application of the FCRA's definition of "adverse action" also directly contravenes the plain language of the statute. The relevant portion of the statutory definition of "adverse action" limits the FCRA's notice requirements to "an increase in any charge for . . . any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). Under the Ninth Circuit's broad interpretation, an increase occurs whenever a consumer pays a higher rate because his credit rating is less than the top potential score – even if the consumer in fact obtains insurance rates that are more favorable than those he would have had if his credit information had not been used and even if the consumer is provided insurance at the rate previously quoted to him or her without use of any credit information.

The Ninth Circuit's "top potential score" benchmark for determining whether there has been an increase in the charge for insurance is found nowhere in the language of the FCRA. If sustained, this new definition would require adverse action notices to nearly all purchasers of insurance. The district court's common sense holding that an "increase in any

charge" for insurance cannot occur "unless the insurer makes an initial demand for payment to the insured and subsequently increases the amount of that demand based on information in the insured's credit report"[3] accords with the language of the statute and provides a bright line rule. Alternatively, the procedure adopted by GEICO, under which adverse action notices are provided only to those purchasers who were charged a higher rate than would have been charged had their credit information been neutral, complies with the letter and purposes of the statute.

For these reasons and those set forth below, NAMIC respectfully submits that the Ninth Circuit's decisions in the cases at bar should be reversed.

I. THE NINTH CIRCUIT'S WILLFULNESS STANDARD IS CONTRARY TO THE FCRA'S STATUTORY LANGUAGE AND PURPOSE

A. The Ninth Circuit Erred in Its Interpretation of the Statutory Term "Willful"

The statutory language and context of section 1681a of the FCRA, considered in light of the principles of statutory interpretation established by this Court, require that "willful" noncompliance be interpreted to mean a knowing and intentional failure to comply with the statute. The Ninth Circuit's ruling that "willfulness" encompasses not only knowing and intentional noncompliance with the statute, but also "reckless disregard" of the statute's requirements, *see Reynolds*, 435 F.3d at 1098-99, is incompatible with the statutory language and context, creating enormous, unintended liability for insurance companies and others subject to the FCRA.

The Ninth Circuit's holding that a willful failure to comply encompasses reckless disregard is based upon the incorrect

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[3] *Rausch v. Hartford Fin. Servs. Group, Inc.*, No. CV 01-1529-BR, 2003 WL 22722061, at *2 (D. Or. July 31, 2003), *rev'd sub nom. Reynolds v. Hartford Fin. Servs. Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005), *superseded by* 435 F.3d 1081 (9th Cir. 2006).

contention that this Court's precedents establish the rule that the word "willful" as used in civil statutes includes the meaning "reckless," while in criminal statutes the meaning of the word "willful" is limited to intentional conduct that the defendant knows to be unlawful. *See id.* at 1098. This Court has established no such rule. Indeed, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and the other cases cited by the Ninth Circuit, do not support the criminal/civil distinction drawn by the Ninth Circuit. In *Thurston*, far from adopting such a distinction, this Court's analysis of the meaning of the word "willful" under the Age Discrimination in Employment Act looked to prior decisions construing both civil and criminal statutes. *See id.* at 126-27.

Moreover, this Court has not uniformly construed "willful" in civil statutes to include reckless disregard. In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), for example, this Court expressly rejected that interpretation in construing the word "willful" in section 523(a)(6) of the Bankruptcy Code, a civil provision, which creates an exception from bankruptcy discharge for debts "for willful and malicious injury by the debtor to another." 11 U.S.C. § 523(a)(6). This Court held that the word "willful" indicated "a deliberate or intentional injury." 523 U.S. at 61. In *Kawaauhau*, the Court noted that if Congress had intended a broader meaning, it "might have selected an additional word or words, *i.e.*, 'reckless' . . . to modify 'injury.'" *Id.* The Court also stressed that the "more encompassing interpretation" urged by the plaintiffs in that case would improperly except a wide range of debts from discharge (*id.* at 58) – a result long held to be contrary to the purposes of the bankruptcy statutes.

This Court has repeatedly emphasized that the word "willful" as used in statutes is "'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998) (citation omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (same). Accordingly, in determining the meaning of the word "willful" in both criminal and civil statutes, this Court has looked to principles of statutory construction that require a careful analysis of the language, context and purposes of the statute in question.

In construing the word "willful," this Court has examined both the immediate context in which the word is used and "the complex of provisions in which [it is] embedded." *Ratzlaf*, 510 U.S. at 141. In particular, in determining the meaning of the word "willful," this Court has looked to the word or words that "willful" modifies. *See, e.g., Kawaauhau*, 523 U.S. at 61 ("The word 'willful' in [11 U.S.C. § 523](a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury."). Moreover, in conformity with the rule of statutory interpretation that a "term appearing in several places in a statutory text is generally read the same way each time it appears," this Court has recognized that the word "willful" should not be construed so malleably as to have an individuated interpretation each place it appears or with regard to the different terms, phrases or statutory sections to which it refers. *Ratzlaf*, 510 U.S. at 143.

An analysis of the statutory language following these principles of statutory interpretation demonstrates that "reckless" is not within the possible range of meanings of the word "willful" as used in subsection 1681n(a) of the FCRA. In particular, an analysis of this subsection shows how the context in which the word "willful" is found limits its meaning. Subsection (a) specifies both the damages available generally for willful noncompliance with the requirements of the statute and the damages available specifically for willfully obtaining a consumer report under false pretenses or knowingly without a permissible purpose. *See* 15 U.S.C. § 1681n(a)(1)(A) & (B). Grammatically, subsection (a) consists of a single sentence, the first portion of which introduces and then is completed by a number of paragraphs and subparagraphs listing the available damages.[4]

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[4] Subsection (a) reads in its entirety as follows:

> **(a) In general**
>
> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

The word "willfully" occurs in the introductory portion of subsection (a) ("Any person who *willfully* fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of--"), and, consequently, all of the damages provisions listed in the following subparagraphs are contingent upon a willful failure to comply with the statute.

Thus, under the principles of statutory interpretation discussed above, the word "willfully" in section 1681n(a) must be given a meaning that is compatible with all of the subparagraphs to which it refers. The use of the word "willful" to modify conduct described in subparagraph (a)(1)(B), namely, "obtaining a consumer report under false pretenses or knowingly without a permissible purpose" is, however, clearly incompatible with the meaning of "reckless" attributed to it by the Ninth Circuit.

By its plain terms, a willful failure to comply with the statute as described in subsection (a)(1)(B) must be knowing and intentional, both in the case of willfully "obtaining a consumer report under false pretenses" and in the case of willfully "obtaining a consumer report . . . knowingly without a permissible purpose." First, the words "under false pretenses" clearly describe conduct that is knowingly and intentionally deceptive. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (statutory language making unlawful the use or employment of "any manipulative or

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> **(1)(A)** any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
>
> **(B)** in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;
>
> **(2)** such amount of punitive damages as the court may allow; and
>
> **(3)** in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n(a).

deceptive device or contrivance" strongly suggests that the statute "was intended to proscribe knowing or intentional conduct"). Likewise, the words "knowingly without a permissible purpose" expressly require that the defendant knows that he does not have a permissible purpose under the FCRA for obtaining the consumer report in question.[5] The concept of recklessness is inconsistent with the statutory language "obtaining a consumer report under false pretenses or knowingly without a permissible purpose." To be sure, the words "willful" and "willfully," when used to describe such conduct, must mean deliberate and intentional.

This Court's established principles of statutory interpretation require that "willful" in section 1681n(a) be given this same meaning in reference to other general acts of willful noncompliance to which subsection (a)(1)(A) is applicable. As noted above, when the word "willful" "appear[s] in several places in a statutory text," it is "generally read the same way each time it appears." *Ratzlaf*, 510 U.S. at 143 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)). Moreover, when, as here with the word "willful," a "*single* formulation" is "called into play" with regard to related provisions, there is "even stronger cause" to construe that formulation "the same way each time it is called into play." *Ratzlaf*, 510 U.S. at 143; *see also Clark v. Martinez*, 543 U.S. 371, 380 (2005) (statutory language given a limited construction in one context must be interpreted consistently in other contexts, even though other of the statute's applications, standing alone, would not support the same limitation).

Accordingly, the meaning of "willfully," as defined by its use as a modifier of the clauses "obtaining a consumer report under false pretenses or knowingly without a permissible purpose," applies also to its use to describe noncompliance in general with the statutory requirements. Because "willfully" means deliberately and intentionally with regard to

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[5] Section 1681b of the FCRA, 15 U.S.C. § 1681b, sets forth the permissible purposes for consumer reports.

subsection (a)(1)(B), it cannot mean "with reckless disregard" in reference to subparagraph (a)(1)(A).[6]

In addition, an interpretation of "willfully" as meaning deliberately and intentionally properly reflects and preserves the distinctions between the three different levels of civil penalties established under the FCRA. The FCRA defines and penalizes willful, knowing, and negligent noncompliance with the Act. *See* 15 U.S.C. § 1681n(a) (willful noncompliance); § 1681n(b) (knowing noncompliance); § 1681o (negligent noncompliance). Under the FCRA, willful noncompliance carries the most severe penalties. Willful noncompliance is subject not only to statutory penalties of up to $1000, but also to punitive damages. *See* 15 U.S.C. § 1681n(a)(1) & (2). Knowing noncompliance (which applies only to improperly obtaining consumer reports) is subject to a penalty of the greater of actual damages or $1000, 15 U.S.C. 1681n(b), while negligent noncompliance renders the defendant liable only for actual damages. These three levels of culpability and the hierarchy of penalties clearly recognize that willful noncompliance is deserving of greater condemnation and punishment than knowing noncompliance, and that knowing noncompliance is more serious than negligent noncompliance. The Ninth Circuit's expansion of "willful" noncompliance to include "reckless disregard" improperly subjects conduct of a lesser degree of culpability to the most severe penalties available under the statute. *Cf., e.g., Cocio v. Bramlett*, 872 F.2d 889, 892 (9th Cir. 1989) (the law recognizes that "[i]ntentional acts are more reprehensible than reckless acts. Reckless acts are more serious than negligent acts.") (citing *Solem v. Helm*, 463 U.S.

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[6] This construction of the word willful also accords with standard dictionary definitions. *See, e.g., Merriam Webster's Collegiate Dictionary* 1354 (10th ed. 1994) (defining willful as "obstinately and often perversely self-willed" or "done deliberately: INTENTIONAL"). "Recklessness" is closer to gross negligence. Indeed, as a leading authority on the law of torts has written, there "is no clear distinction at all between ['recklessness'] and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence . . . " William L. Prosser, *The Law of Torts* 185 (4th ed. 1971), *as quoted in Smith v. Wade*, 461 U.S. 30, 73 (1983) (Rehnquist, J., dissenting).

277, 293 (1983)). Construing "willfully" to require deliberate noncompliance with known legal requirements accords with Congress' evident intent to make "willful noncompliance" the most serious, and severely punishable, level of noncompliance with the statute.

Subsection 1681n(b), headed "Civil liability for knowing noncompliance," also provides civil penalties for "obtaining a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose," but does not require that the violation be "willful." 15 U.S.C. § 1681n(b). Significantly, there are no punitive damages for non-willfully obtaining a consumer report. Again, it is evident from the statutory scheme that "willfully" obtaining a consumer report under false pretenses or knowingly without a permissible purpose requires a greater level of culpability than committing the same violation without willfulness. The word "willfully" thus requires more than "false pretenses" and knowledge of unlawfulness, not the lesser degree of culpability embodied in the Ninth Circuit's "reckless disregard" standard.[7]

The FCRA's criminal penalty provision, section 1681q, also bolsters the conclusion that "willful" does not mean "reckless" for purposes of section 1681n. Section 1681q provides criminal penalties for "knowingly *and* willfully obtain[ing] information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q (emphasis added). As in section 1681n, in this context too, the word "willfully" creates a standard of culpability that requires more than mere "knowing," not less. If the Ninth Circuit's interpretation of the word "willfully" were accepted, the phrase "knowingly and willfully" would have the contradictory meaning of "knowingly and at the same time

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[7] An analogous example of Congress' understanding of the terms willfully and knowingly is provided by its amendment of the Endangered Species Act. *See* Endangered Species Act Amendments of 1978, H.R. Conf. Rep. No. 95-1804, at 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9493 (amending penalty provisions of Endangered Species Act to "*reduce*[]" the standard from "willfully" to "knowingly" to facilitate enforcement by eliminating knowledge of the law (required for willfulness) as an element of a violation) (emphasis added).

not knowingly, but recklessly." Clearly, reckless disregard is incompatible with the use of the word "willfully" in section 1681q, where its context again shows it to mean "deliberately and intentionally." Under the rule of statutory construction that a "term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf*, 510 U.S. at 143, the word "willfully" should be given the same meaning in section 1681n that it has in section 1681q. Thus, section 1681q further confirms that, contrary to the Ninth Circuit's holding, "willful noncompliance" in section 1681n(a) does not refer to an intermediate level of culpability between negligence and knowing, but creates a higher standard for liability that requires an intentional and deliberate failure to comply with the requirements of the FCRA.

In sum, examination of the language and context of section 1681n(a) and of the "complex of provisions in which [it is] embedded," *Ratzlaf*, 510 U.S. at 141, demonstrates that there can be liability for "willful" noncompliance with the requirements of the FCRA only if it is shown that the defendant knew that its conduct was unlawful and deliberately and intentionally violated the statute. As shown below, that conclusion is supported also by an analysis of the purposes and objectives of the FCRA.

B. The Purposes and Enforcement Needs of the FCRA Are Not Served by the Expanded Liability Created by the Ninth Circuit's Reckless Disregard Standard

In addressing the meaning of the word "willful," this Court has considered the purposes of both the particular statutory provision and the larger statutory scheme of which it is a part, the nature of the conduct regulated or prohibited by the statute, and the scope of enforcement and deterrence needed to effectuate the statutory goals. Despite lip service to the need for a "fair and balanced" approach that purportedly "best furthers the purposes and objectives of the Act," *Reynolds*, 435 F.3d at 1099, the Ninth Circuit's opinion is lopsided, elevating enforcement and deterrence over other statutory purposes.

In enacting and amending the FCRA, Congress sought to regulate an aspect of economic activity -- the use and distribution of credit information -- that it recognized was a vital and necessary part of a healthy, functioning economy. In seeking to ensure the accuracy of credit information, Congress acted not only to protect consumers, but to advance the needs of the nation's economic system.[8] The Ninth Circuit's expansive interpretation of the statutory term "willful" upsets the balance struck by Congress and places an excessive and potentially crushing burden of liability on users and providers of credit information, facilitating and encouraging huge nationwide class actions seeking statutory and punitive damages. Under the Ninth Circuit's erroneous "recklessness" standard, this massive litigation can be accomplished without the plaintiffs having to prove knowing and intentional wrongdoing on the part of the defendant, and without having to prove that they have suffered any actual harm at all from the instances of noncompliance they allege. This result is damaging to the nation's economic system and credit markets and is not compatible with the purposes of the FCRA.

Different interpretations of the word "willful" may be required to advance the purposes and enforcement of different statutes. For example, as noted above, section 523(a)(6) of the Bankruptcy Code, which excepts from discharge debts for "willful and malicious injury by the debtor to another . . . " applies only to "deliberate or intentional injury," not to recklessly caused injuries. *See Kawaauhau,* 523 U.S. at 61. A "more encompassing interpretation" would improperly except a wide range of debts from discharge (*id.* at 58) – a result long held to be contrary to the purposes of the bankruptcy statutes. Conversely, under 26 U.S.C. § 6651(a)(1), which establishes civil penalties for failure to file a tax return "unless it is

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[8] *See, e.g.*, Senate Report No. 108-166 (Oct. 17, 2003), *available at* 2003 WL 22399643, at *6-7 (achieving accuracy in consumer report information was a main goal of the FCRA because "inaccuracy retains the potential to be particularly unfair to any given consumer and to cause general inefficiencies in the operation of the credit markets;" the goals of 1996 FCRA amendments were to improve accuracy of credit information and "enhance the development of national credit markets").

shown that such failure is due to reasonable cause and not due to willful neglect," "willful neglect" is interpreted as including both "a conscious, intentional failure" and "reckless indifference." *United States v. Boyle*, 469 U.S. 241, 245 (1985). As this Court explained, the purposes and enforcement needs of the internal revenue system required that standard, given that "[t]he Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards." *Id.* at 249.

In the case of criminal penalties for "willfully violating" statutory provisions prohibiting structuring currency transactions to evade reporting requirements, this Court has interpreted the word "willfully" to mean with knowledge that the structuring was unlawful. *Ratzlaf*, 510 U.S. at 146-47. Significantly, in *Ratzlaf*, the Court was "unpersuaded by the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring." *Id.* at 146. Rather, the Court observed that in many instances an individual may permissibly structure a transaction so as to achieve a particular result under the applicable statutes. *Id.* at 145 ("Courts have noted 'many occasions' on which persons, without violating any law, may structure transactions 'in order to avoid the impact of some regulation or tax.'") (citations omitted). Accordingly, in that context, a willfulness standard requiring knowledge of illegality is necessary to protect individuals engaging in behavior they believe to be permissible. The Court also noted that if Congress had wished to impose liability "irrespective of the defendant's knowledge of the illegality of structuring," it "could have furnished the appropriate instruction." *Id.* at 147.

Likewise, the statutory purposes and the nature of the conduct prohibited appears to have been a significant factor in this Court's interpretation of the word "willful" in employment discrimination statutes. Those statutes were enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace" and "reflect[] a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995); *see also Kolstad v. Am. Dental Ass'n*,

527 U.S. 526, 550 (1999) (Stevens, J., concurring in part and dissenting in part, joined by JJ. Souter, Ginsburg, and Breyer) (rejecting statutory interpretation of punitive damages standard under Title VII and the ADA that would have limited punitive damages to "only those violations that are accompanied by particularly outlandish acts"). Where the conduct prohibited by a statute is condemned by society and threatens the fundamental rights of other persons, a defendant's reckless disregard of the statutory prohibition may qualify as "willful," and the resulting heightened level of deterrence and enforcement furthers the statutory objectives.

In contrast, the FCRA regulates economic and financial practices. While the FCRA seeks to protect individual consumers from potential injury caused by inaccuracies in their credit reports, it also recognizes the economic efficiencies and beneficial aspects of the "current system" of the use of credit information that "makes more credit available, to a greater range of consumers, on a more timely basis." S. Rep. No. 108-166, *available at* 2003 WL 22399643, at *4. This has been accomplished through advances in technology that have made credit information available on a very large scale, so that "a consumer's credit risk is carefully calculated so that he is offered a particular rate or terms that closely match the risks his report suggests he poses." *Id.* at *7; *see also id.* ("Because of the precision it affords creditors, risk-based pricing has made credit available to many more people."). Thus, Congress has recognized that "[o]verall, the use of risk-based pricing provides numerous benefits to the economy and consumers." *Id.* at *8. These benefits are presented in the use of credit information in insurance underwriting, as well. In short, the FCRA regulates beneficial economic activity in a "consumer reporting system" of "vast size and complexity" that "supports decision making with respect to trillions of dollars of consumer credit and insurance and millions of jobs." *Id.* at *6-7. Accordingly, the statutory purposes and enforcement needs of the FCRA are not comparable to those of the anti-discrimination statutes at issue in the cases upon which the Ninth Circuit relied. *See Reynolds*, 435 U.S. at 1098 (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128

(1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993)).[9]

That Congress did not intend users and providers of credit information to be subject to the expanded liability engendered by the Ninth Circuit's decision is also confirmed by the fact that since the original enactment of section 1681n in 1970 the Courts of Appeals have consistently held that "willfulness" requires knowledge that the conduct is unlawful or a *conscious* disregard of the law. *See, e.g., Stevenson v. TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993) (no willful noncompliance where defendant did not act "knowingly and intentionally" and "in conscious disregard of consumers' rights"); *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 969-70, 972 (4th Cir. 1987) (willfulness requires that FCRA has been "violated 'voluntarily and intentionally'") (citation omitted); *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986) (reversing award of punitive damages under FCRA for lack of willfulness where there was "no evidence that [defendants] knowingly and intentionally committed an act in conscious disregard for the rights of others").[10] Significantly, after

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[9] This Court's analysis in *Thurston* also relied extensively on the legislative history of the ADEA, which strongly suggested that Congress intended the ADEA to apply to reckless conduct. *See* 469 U.S. at 127-29; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (recognizing that the *Thurston* "reckless disregard" standard was grounded in the legislative history of the ADEA). There is no support in the legislative history of the FCRA for interpreting "willful" noncompliance under section 1681n(a) to include reckless disregard.

[10] *See also Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002) ("[W]illful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law"); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (an actual belief of legality suffices to defeat willfulness liability under the FCRA); *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995) (holding that defendant's "course of conduct d[id] not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA"); *Dalton v. Capital Associated Indus. Inc.*, 257 F.3d 409, 418 (4th Cir. 2001) ("willfulness" under the FCRA requires that the defendant "'knowingly and intentionally committed an act in conscious disregard for the rights'"

these decisions, when section 1681n was amended in 1996, Congress made no change to the standard for willful violations of the Act.[11] Presumably, had Congress intended willfulness to include reckless disregard, it could have amended the statute to add the word "recklessly."

In appropriate statutory contexts, "willfulness" may be interpreted to include recklessness – particularly where the conduct in question involves a serious risk of impairing fundamental rights or causing physical injury. Such an interpretation is inappropriate, however, in other contexts such as the FCRA. This distinction accords with common-sense observation as to how the word "willful" is used in ordinary language. It also is consistent with basic common law principles relevant to the issue of when reckless conduct is sufficient to merit punitive damages. Typically, punitive damages are deemed appropriate for reckless conduct only if the conduct causes physical injury or results in a deprivation of a fundamental constitutional right.[12] Conduct that causes or threatens only economic harm generally must be intentional to merit punitive damages. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (differentiating between economic and physical harm; listing "reckless disregard of the health or safety of others" as factor in punitive damages analysis); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 (1996) (noting absence of "reckless disregard for the health and safety of others;" stating that "infliction of economic injury, especially when done *intentionally* through affirmative acts of misconduct" can

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of the consumer) (citation omitted); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) ("To act willfully, a defendant must knowingly and intentionally violate the Act, and it 'must also be conscious that [its] act impinges on the rights of others.'") (alteration in original; citation omitted).

[11] In contrast, under Title VII, Congress spelled out its intent that punitive damages may be awarded for intentional discrimination if it is demonstrated that the employer acted with "malice or with reckless indifference to the [plaintiff's] federally protected rights." 42 U.S.C. § 1981a(b)(1).

[12] *See, e.g., Casillas-Diaz v. Palau*, 463 F.3d 77, 84-85 (1st Cir. 2006). (punitive damages appropriate where defendants acted "with reckless disregard of plaintiffs' constitutional rights").

warrant punitive damages) (emphasis added; citation omitted).

In concluding that a "reckless disregard" standard would be "fair and balanced" and would "best further the purposes and objectives of the Act," the Ninth Circuit improperly emphasized what it viewed as the need to ensure that section 1681n "d[id] not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression'" and to distinguish between such companies and companies who might "come to a tenable, albeit erroneous, interpretation of the statute." *Reynolds*, 435 F.3d at 1099; *see also id.* ("reliance on creative lawyering that provides indefensible answers will [not] ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement"). Based upon such considerations, the Ninth Circuit in *Reynolds* reversed the grant of summary judgment in favor of the defendants on the issue of willfulness, ruling that "at least some" of the defendant insurance companies' interpretations of the FCRA were "implausible" or "frivolous." *Id.* at 1095, 1099. The Ninth Circuit's precepts as to the application of its willfulness/recklessness standard and its concerns that companies and attorneys will abuse situations in which they are faced with a question of "first impression" have no basis in the statutory language of the FCRA and its purposes and objectives, or for that matter, in the legislative history.

Under the Ninth Circuit's decision, factors that normally favor a finding of an absence of willfulness and/or recklessness as a matter of law are turned on their heads, all in service of a jaundiced and unsupported view of how businesses and companies formulate their conduct in regulatory and compliance contexts and how lawyers view their obligations to their clients and to the legal system. For example, the fact that an issue is one of first impression normally weighs toward excusing or mitigating a failure to understand a legal issue or comply with regulatory requirement. Thus, in *Stevenson*, 987 F.2d at 296, the Fifth Circuit reversed a finding of willful noncompliance and an award of punitive damages under the FCRA because "[t]here

was no prior guidance to suggest" that the defendant's conduct did not comply with the Act.[13] Likewise, the fact that a defendant has consulted counsel or that (as in the present cases) the trial court agreed with the defendants' interpretation of their legal obligations would generally negate willfulness even under a recklessness standard. *See, e.g., Thurston*, 469 U.S. at 129 (defendant did not act in reckless disregard of ADEA's legal requirements where its "officials met with their lawyers to determine whether the mandatory retirement policy violated the Act"); *see also* Vairo, *supra* note 13, at 351 (the fact that judges who have ruled on the merits of a pleading disagree provides significant evidence that the pleading was not frivolous or unreasonable).[14] The Ninth Circuit incorrectly operates under the opposite presumption.

In sum, the Ninth Circuit's interpretation of section 1681n(a) as applicable to conduct that the defendant does not

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[13] Similarly, in the context of Federal Rule of Civil Procedure 11, courts have repeatedly refused to find a legal argument frivolous or unreasonable where it concerns a matter of first impression. *See* Georgene M. Vairo, *Rule 11 Sanctions: Care Law, Perspectives and Preventative Measures* 340-46 (3d ed. 2004).

[14] Notably, in an earlier version of the opinion in *Reynolds*, the majority found that the defendants' interpretations of the statutory definition of adverse action were unreasonable and implausible as a matter of law and held that the defendants' "reliance on such implausible interpretations constitutes reckless disregard for the law and therefore amounts to a willful violation of the law." *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 426 F.3d 1020, 1038 (9th Cir. 2005), *amended*, 435 F.3d 1081 (9th Cir. 2006). The majority declined to remand these cases to the district court for a finding on willfulness, noting that "[b]ecause the district judge has already ruled that the companies' positions on all of the principal issues were correct as a matter of law, she has also held, a fortiori, that the companies' reliance on these positions did not amount to reckless disregard for the law" and that it would be "futile[] to remand to the district court the questions whether the companies willfully failed to comply with FCRA." 426 F.3d at 1039 n.19. Judge Bybee dissented from this aspect of the majority's opinion, pointing out that the "district court *agreed* with [defendants'] legal position, a position the majority now declares to be 'nonsensical' and 'untenable.'" *Id.* at 1041 (Bybee, J., dissenting in part).

know to be unlawful is inconsistent with the language and purposes of the statute. Moreover, even if a recklessness standard were appropriate, the Ninth Circuit's directives on how a reckless standard would apply in the cases at bar warrant correction by this Court.

II. THIS COURT SHOULD CORRECT THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE FCRA'S DEFINITION OF "ADVERSE ACTION"

In its decisions below, the Ninth Circuit disregarded the ordinary and natural meanings of key terms in the statutory definition of "adverse action" in section 1681a(k)(1)(B)(i) of the FCRA, thereby expanding the notice obligations imposed upon insurance companies far beyond what the plain words of the statute authorize. In particular, the Ninth Circuit erred in ruling that the FCRA "requires [an adverse action] notice[] whenever a consumer pays a higher rate because his credit rating is less than the top potential score." *Reynolds*, 435 F.3d at 1093. The Ninth Circuit's holding erroneously expands the statute to cover factual circumstances in which (i) there is no credit information available for a consumer, (ii) the consumer obtains insurance rates that are better than those he would have had if his credit information had not been used, and (iii) the consumer is provided insurance at the rate previously quoted to him without use of his credit information. The Ninth Circuit's decision imposes a heavy burden on insurance companies making lawful use of credit information and is likely to result in a deluge of notices that will either confuse consumers or be ignored by them.

The "top potential" credit benchmark invented by the Ninth Circuit is found nowhere in the language of the statute. Use of that benchmark to determine whether there has been an increase in the rates charged for insurance within the meaning of the FCRA's definition of adverse action would lead to the untenable result, certainly unintended by Congress, that virtually every purchaser of insurance would be required to receive a FCRA notice. *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (statutes should not be read to produce absurd and untenable results). The "ordinary

or natural" reading of "an increase in any charge" implies a simple and logical benchmark, *i.e.*, the price that was actually quoted or would have been quoted to the consumer without reference to credit information.

Significantly, Congress knows how to draft statutory language describing an action based on an unfavorable rate, even though there has been no "increase in any charge." Thus, in 2003, Congress enacted 15 U.S.C. § 1681m(h), as part of the Fair and Accurate Credit Transactions Act, Pub. L. No. 108-159, tit. III, § 311(a). Section 1681m(h)(1) requires notice when "any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit *on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person*, based in whole or in part on a consumer report." 15 U.S.C. § 1681m(h)(1) (emphasis added). Section 1681m(h)(1) also demonstrates that, contrary to the Ninth Circuit, Congress has not made a policy determination to require notice to everyone who receives less than the most favorable terms, but only to those who receive terms less favorable than the most favorable terms available to a substantial proportion of consumers.

At the same time Congress added to the FCRA the definition of adverse action at issue in these cases, it amended the FCRA to make plain that insurance companies and credit companies may permissibly make offers to consumers prescreened on the basis of their credit information, without triggering notice obligations to consumers who do not receive the offer. *See* S. Rep. No. 104-185, at 32-33 (1995) (discussing 15 U.S.C. § 1681b(c)(1)(B)(i) & 1681a(l);"failure to include a consumer in a prescreening solicitation does not constitute adverse action"). The same amendments also made clear that a company may use consumer reports to review the accounts of existing customers, and that there is no adverse action if a consumer's account is not changed, even if the accounts of other consumers are changed in a favorable manner. *See id.* (discussing 15 U.S.C. 1681a(m)). These amendments, which accompanied Congress's enactment of the definition of "adverse action" in the insurance context, are not compatible

with an interpretation of the definition of adverse action that is aimed at achieving the widest possible obligation to send adverse action notices.

The Ninth Circuit's erroneous rulings, if allowed to stand, will create vastly expanded, costly and burdensome notice obligations under the FCRA. These rulings should be reversed.

CONCLUSION

For all the foregoing reasons, *amicus curiae* respectfully submits that this Court should reverse the Ninth Circuit's decisions, both as to the Ninth Circuit's interpretation of the statutory term "willfully" in section 1681n(a) of the FCRA and as to its interpretation and application of the statutory definition of adverse action in section 1681a(k)(1)(B)(i) of the FCRA.

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Nos. 06-84 and 06-100

In The Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, et al.,

Petitioners,

v.

CHARLES BURR, et al.,

Respondents.

GEICO GENERAL INSURANCE COMPANY, et al.,

Petitioners,

v.

AJENE EDO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE THE NATIONAL CONSUMER LAW CENTER, INC., THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE U.S. PUBLIC INTEREST RESEARCH GROUP, THE NATIONAL ASSOCIATION OF CONSUMER AGENCY ADMINISTRATORS, THE CENTER FOR RESPONSIBLE LENDING, AND THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are public interest organizations with long-standing experience with the consumer reporting and privacy issues implicated by this case. Amici submit this brief to provide the Court with background information about the consumer reporting industry. The brief focuses on the implications that the Court's decision inevitably will have on the broader credit, credit reporting, and privacy aspects of the Fair Credit Reporting Act (FCRA).

The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts corporation specializing in consumer law, with historical emphasis on consumer credit. NCLC is recognized nationally as an expert in consumer credit issues, including fair credit reporting, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 36 years. NCLC is the author of the Consumer Credit and Sales Legal Practice Series, consisting of 16 practice treatises and annual supplements. One volume, Fair Credit Reporting Act (5th ed. 2002 & Supp. 2005), is a standard resource on privacy and the FCRA. Petitioner GEICO relies on this treatise in its Brief. GEICO Brief, at 3 and 25. Among the authors of this treatise are undersigned counsel.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amici Curiae, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Compliance with federal consumer protection laws in general, and the FCRA in particular, has been a continuing concern of NACA since its inception.

The U.S. Public Interest Research Group serves as the federation of, and the national advocacy office for, state Public Interest Research Groups (PIRGs). PIRGs are non-profit, non-partisan consumer, environmental, and government research and advocacy organizations with one million members around the country. Since 1991, U.S. PIRG and the state PIRGs have published seven investigative reports and surveys on credit bureau errors and identity theft problems, including one joint report with the Privacy Rights Clearinghouse. Congress and state legislatures have used the reports in the development of legislation ranging from 25 state credit report security freeze laws to pro-consumer Congressional amendments enacted in 1996, 1998, and 2003, including the right to a free credit report on request and others responding to accuracy and identity theft problems.

The National Association of Consumer Agency Administrators (NACAA) is a non-profit organization that works with consumers to solve problems, prosecute offenders, advance legislation, and educate the public. NACAA's members are public and private advocates, including more than 160 government agencies and 50 corporate consumer offices in the United States and abroad.

The Center for Responsible Lending (CRL) is a non-profit organization which has directed research and policy work on issues related to preemption, predatory lending,

discrimination in credit markets, and other banking services. CRL's parent organization is the Center for Community Self-Help, whose mission is to create ownership and economic opportunities for minorities, women, rural residents, and low-wealth families. CRL has testified numerous times before Congress, has worked with consumers and consumer organizations on financial services issues both nationally and at the state level, and has appeared frequently as an amicus in cases involving financial services to minorities and low and moderate income families.

The Consumer Federation of America (CFA) is a non-profit association of over 300 non-profit organizations from throughout the nation with a combined membership exceeding 50 million people. CFA was founded in 1968 to advance consumer interest through advocacy and education. CFA has a long history of educating consumers about and advocating for stronger credit reporting consumer protections. For example, CFA has supported the use of adverse action notices for credit and insurance purposes as essential to informing consumers about the higher rates that they may have to pay as a result of their credit or insurance score. In December 2002, CFA and the National Credit Reporting Association issued a report on credit scoring entitled "Credit Score Accuracy and Implications for Consumers." The report documented that millions of Americans could pay more for, or be denied credit, insurance, or utilities because of inaccurate or incomplete credit scores and reports. CFA has conducted consumer knowledge and opinion surveys about credit scoring, documenting that many consumers do not understand basic facts about how credit scores are developed. CFA has also published a free educational brochure for consumers with Fair Isaac Corporation entitled "Your Credit Scores."

SUMMARY OF ARGUMENT

Congress's findings and statement of purpose when it enacted the FCRA, its ongoing oversight, and its recent amendments demonstrate the significance it rightly placed on the integrity and confidentiality of the nation's consumer reporting system. Unfortunately, over the last 35 years, the national consumer reporting agencies have demonstrated an inadequate commitment to conducting their business in a manner commensurate with the grave responsibilities entrusted to them. The resulting systemic deficiencies have heightened the importance of the adverse action notice and statutory civil damages at issue here since they are essential tools that Congress provided consumers to enable them to detect, correct, and seek redress for problems with their own credit reports.

Congress recognized that responsibility for protecting the accuracy and confidentiality of the 600 million individual reports on 200 million Americans maintained in the vast databases of the Big Three consumer reporting agencies is beyond the capabilities of public enforcement agencies.[2] Congress instead gave primary responsibility to the persons with the greatest interest in accomplishing such a task – individual consumers policing their own files and when necessary enforcing the FCRA's private statutory remedies.

Petitioners are seeking a restrictive application of the statutory willfulness standard that would undermine the indispensable private attorney general role that Congress chose as the FCRA's primary enforcement mechanism. Petitioners' position on the willfulness standard would

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[2] The Big Three national consumer reporting agencies, commonly referred to as credit bureaus, are Trans Union, Equifax, and Experian, f/k/a TRW.

undercut the recent concerted efforts of Congress, the Federal Trade Commission, consumer advocacy groups, law enforcement agencies, and ordinary citizens to increase compliance with the FCRA. Relaxing enforcement standards now is particularly untimely and unwarranted. Moreover, Petitioners' legal contention conflicts with other FCRA provisions and is contrary to precedent of the Court.

In recent years Congress targeted the deficiencies of the Big Three reporting agencies in maintaining the integrity of the consumer reporting system. After 25 years of relative inactivity, Congress overhauled the FCRA twice in the last ten years to strengthen its substantive accuracy standards, privacy protections, and private enforcement mechanism. During this process, Congress heard evidence of widespread noncompliance and abuses by all participants in the reporting industry: the Big Three consumer reporting agencies, those who furnish information to the reporting agencies (furnishers), and the end users of the credit reports (users). The efficacy of Congress's efforts to remedy these deficiencies is at stake in this case.

A relatively recent assault on the integrity of the consumer reporting system has emerged in the form of theft of identity, a phenomenon that poses a threat to every American with a credit report. The reporting industry, if it chooses, has the capacity to curtail identity theft, if not to bar virtually all identity thieves from compromising individual credit reports, the *sine qua non* of the offense. Instead, because the industry has chosen not to do so, the dysfunctional consumer reporting system itself has become the vehicle through which these thieves operate.

By attacking the insurance adverse action notice of § 1681a(k)(1)(B)(i), Petitioners propose that the Court eliminate an information-sharing device essential to the FCRA's self-help system. That system relies on consumers monitoring their own reports as the linchpin of its

effectiveness. Consumers who do not receive an adverse action notice consequently do not learn of their right to a free credit report to check its accuracy and to initiate the formal dispute process if any information is inaccurate. Even if the information is accurate, consumers who do not receive the notice are not alerted to the shortcomings in their own credit profile so they can take necessary corrective action to improve their standing. Providing an adverse action notice to consumers who qualify only for a higher insurance premium is particularly important for those identity theft victims who are not active credit users, as this notice may be the only alert they ever receive that their credit profile has been compromised. Petitioners want to deny consumers the adverse action notice that often is their first indication that they are victims of identity theft.

The harmful consequences of Petitioners' contentions are not limited to disrupting the internal workings of the FCRA. Rather, Petitioners' position would upset the interplay between the FCRA and other titles of the Consumer Credit Protection Act and, in turn, impede the efficiency of the open market. Petitioners want to conceal that they are not offering customers the best rate available. This deception prevents consumers from comparison shopping for a better rate and, of course, results in customers unwittingly paying more than they might otherwise pay. Petitioners' putative elimination of the statutorily mandated adverse action notice is an anti-competitive practice in our free market that otherwise relies on informed consumers and honest competition rather than captive customers held in ignorance.

ARGUMENT

A. Congress Enacted the FCRA to Ensure Accuracy and Protect Privacy in Disseminating Consumers' Personal Financial Information

1. Congress Determined That Accuracy and Respect for Privacy Are Essential to a Competitive Credit Economy in the Information Age

Congress enacted the FCRA in the explicit recognition that the health of the consumer banking system "depend[s] upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." § 1681(a)(1). Congress focused on the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right of privacy" and "confidentiality." § 1681(a)(4) and (b). The Court summarized these precepts in its only FCRA decision to date:

> Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy. As relevant here, the Act seeks to accomplish those goals by requiring credit reporting agencies to maintain reasonable procedures designed to assure maximum possible accuracy of the information contained in credit reports and to limit the furnishing of such reports to certain statutorily enumerated purposes.

TRW Inc. v. Andrews, 534 U.S. 19, 23 (2001) (internal quotations, ellipsis, and citations omitted).

In enacting the FCRA, Congress intended to regulate the disclosure of a vast amount of personal information bearing not only on consumers' "credit worthiness, credit standing, [and] credit capacity," but also on their "character, general reputation, personal characteristics, or mode of living." § 1681a(d) (defining "consumer report"). Information about one's finances is particularly sensitive:

"Financial transactions can reveal much about a person's activities, associations, and beliefs." *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Many genuine, justifiable purposes exist for using credit reports, and the FCRA explicitly authorizes those uses while prohibiting all others. § 1681b(a) and (f).

Congress's goals in enacting the FCRA are even more critical given the exponential growth in consumer credit over the past several decades. Consumer credit (non-real estate) now comprises one of the largest sectors of the national economy, growing from $6 billion at the end of World War II, to $116 billion in 1970 when Congress enacted the FCRA, S. Rep. 103-209, 103d Cong., 1st Sess., at 2-3 (1993), and most recently passed $2.378 trillion.[3]

The credit reporting industry has similarly expanded to support this phenomenal level of activity. Only 13 years ago the consumer reporting industry maintained credit files on about 110 million individuals and cumulatively processed almost 2 billion pieces of data per month. S. Rep. 103-209, at 3. Now, the databases of the Big Three have almost doubled, containing information on the personal financial habits of 200 million persons, the overwhelming majority of the entire adult population of the country. Brief of Amicus Curiae Trans Union, LLC, at 1. In this same period, the amount of data has tripled, with Trans Union alone processing over 2 billion pieces of data per month in its own database, *id.*, and Experian claiming to receive 50 million updates per day from approximately 40,000 furnishers. *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004).

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[3] Federal Reserve Board Statistical Release, G.19, Consumer Credit, October 2006, Release Date: December 7, 2006, available at <http://www.federalreserve.gov/Releases/G19/Current>.

2. Congress Enacted the Consumer Credit Protection Act to Encourage Informed Use of Credit

Congress enacted the FCRA in 1970 as Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (CCPA), the umbrella act containing the federal statutes regulating the consumer credit industry. Other titles in the CCPA include the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667e; the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f; and the Fair Debt Collection Practices Act, (FDCPA), 15 U.S.C. §§ 1692-1692o. A recurring theme at the heart of the CCPA is that prudent dissemination of credit information is essential to maintain the vitality of the credit granting system in a competitive and open market for the benefit of creditors and consumers alike. Just as Congress enacted the FCRA with the express purpose to enable credit grantors to be in the best position to make reliable lending decisions, TILA establishes the corresponding principle through its disclosure requirements that consumers are best served through their own "informed use of credit." § 1601(a).

"Congress enacted the Truth in Lending Act in part because it believed 'consumers would individually benefit not only from the more informed use of credit, but also from heightened competition which would result from more knowledgeable credit shopping.'" *Till v. SCS Credit Corp.*, 541 U.S. 465, 482 (2004) (quoting S. Rep. No. 368, 96th Cong., 2d Sess. 16, *reprinted in* 1980 U.S.C.C.A.N. 252) (footnote omitted). In addition to the FCRA and TILA, Congress included a further self-help checking mechanism within the CCPA in the ECOA, providing yet another information-sharing standard through its core requirement that creditors disclose, and consumers receive, the specific reasons for any adverse action, such as credit denial. § 1691(d).

The Court stated the guiding principle of this Congressional philosophy over 30 years ago: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Serv., Inc.*, 411 U.S. 356, 364 (1973). The FCRA was passed with the recognition that credit decisions made on the basis of faulty information, whether by credit grantors or consumers, undermine the vitality of the consumer economy. The successful operation of the consumer credit system is fundamental to the national economy and the ability of Americans to enjoy the fruits of this country's material prosperity. The strength of this system is a function of the soundness of the individual decisions that comprise it. Failure within this system is not only expensive but also severely disruptive, causing "bankruptcies, marital instability, loss of jobs, and invasions of individual privacy." § 1692(a) (FDCPA). Simply put, the viability of our credit economy depends on accurate information; Congress designed the FCRA to increase that accuracy.

B. Private Enforcement is Essential to Ensuring That the Reporting Industry Complies With the FCRA

1. Petitioners Want to Weaken Private Enforcement Remedies at the Very Moment When Congress Has Strengthened Them

Congress clearly recognized the crucial role that consumers play in enforcing the CCPA when it adopted six titles with private attorney general enforcement provisions.[4] No one has a stake in the accuracy or privacy of a

[4] *See* 15 U.S.C. §§ 1635, 1640, and 1667d (TILA); § 1679g (Credit Repair Organizations Act); § 1681n and 1681o (FCRA); § 1691e (ECOA); § 1692k (FDCPA); and § 1693m (Electronic Funds Transfer Act).

credit report like the consumer to whom it relates. While the FTC deals as best it can with systemic issues (§ 1681s), Congress has not funded the army of regulators that would be necessary to monitor the 600 million files that the Big Three maintain. Congress gave that role to each of the individuals whose tranquility and material well-being are determined by these faceless, computer-generated reports. *See Bryant v. TRW Inc.*, 689 F.2d 72, 79 (6th Cir. 1982) (quoting 116 Cong. Rec. 36570 (1970)) ("[A]s Shakespeare said, the loss of one's good name is beyond price and makes one poor indeed").

Congress and the FTC both have reaffirmed the FTC's own limitations and this critical role played by consumers. During the legislative hearings that culminated in the 1996 amendments to the FCRA, the FTC acknowledged that the FCRA "was designed to be largely self-enforcing" and expressed its position directly to Congress that any amendments maintain "the capacity of consumers to bring private actions to enforce their rights under the statute." S. Rep. 103-209, at 6. Congress's response was to strengthen private enforcement by encouraging consumer litigation through the adoption of a specific civil prohibition against unlawful access or use of credit reports (§ 1681b(f)) and the minimum statutory damages now being challenged (§ 1681n(a)(1)). Congress also created for the first time a private right of action allowing a consumer to sue furnishers of information for failing to meet their duties in the reinvestigation process. § 1681s-2(b); *see Nelson v. Chase Manhattan Mtg. Corp.*, 282 F.3d 1057 (9th Cir. 2002).

Congress enacted § 1681n(a) providing statutory and punitive damages for willful noncompliance as the sole consumer tool that might provide an incentive to defendants to comply with the FCRA. Whether one agrees or disagrees with the wisdom of this decision, Congress

exercised its prerogative and chose the award of money damages as its preferred private compliance instrument.[5] Petitioners disagree with that legislative decision, so they are asking for unprecedented and unwarranted relief from the Court.

Amici can add nothing to the persuasive substantive arguments presented in the Brief of the United States as Amicus Curiae applying the Court's prior teaching, showing the context in which Congress adopted § 1681n(a), and expounding the compelling public policy reasons that willful noncompliance includes the "reckless disregard" standard. Amici observe, however, that Petitioners appear unable to explain how Congress could have intended willfulness under § 1681n(a) to generally require a knowledge element when it specifically made knowledge a condition of § 1681n(a)(1)(B).

Petitioners' putative restrictive interpretations would significantly impair the essential consumer self-help role on which Congress constructed the FCRA. Both Petitioners and some of their Amici raise the specter that to affirm the opinion below would disturb the "balance" that Congress imposed within the structure of the FCRA. Safeco Brief, at 35 and 38; Brief of Amicus Curiae Trans Union, LLC, at 5, 6, 7, 8, and 10. In actuality, the statutory

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[5] The power to issue injunctive relief that "federal courts retain" "absent the clearest command to the contrary from Congress," *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), admittedly at times might be preferable to a suit for statutory or punitive damages. Nonetheless, the one circuit court to directly address the issue concluded that the FCRA does not permit consumers to seek injunctive relief. *Washington v. CSC Credit Servs, Inc.*, 199 F.3d 263, 268-69 (5th Cir. 2000). The reporting industry's current attempt to enfeeble the § 1681n(a) standard (*see* Brief of Amicus Curiae Trans Union, LLC, at 24), after having already convinced a lower court to eliminate private injunctive relief, suggests that the reporting industry's primary objection is to Congress's choice to provide private enforcement of the FCRA.

balance at risk is the central role that Congress intended consumers to play in ensuring accuracy of credit reports. Congress gave consumers the combined tools of the adverse action notice, free credit report, and dispute mechanism, and made these tools effective by providing the private attorney general enforcement remedy. Petitioners seek to compromise this legislative design.

2. The FCRA's Private Enforcement Mechanism Is Especially Critical Given the Unique Nature and Business Model of the Reporting Industry

Ensuring vigorous private enforcement of the FCRA is especially important because the credit reporting industry is unlike most other industries in some fundamental respects. First, the clients of the consumer reporting industry are the creditors who furnish or use the information contained in the reporting agencies' databases. Most of these creditors are reporting agency subscribers, which buy the ability to both send and receive consumers' credit histories. The reporting agencies' paying customers are these creditors, not the consumers whose life experiences comprise the 600 million credit reports in the agencies' databases.

Second, consumers have no say in whether their information is included in the reporting agencies' databases. Most Americans cannot avoid having a credit history. Even consumers who do not use credit are included if, for example, they have a cell phone or an unpaid medical bill. Still, credit is a necessity for all but the very wealthy. Most people, for example, must obtain a mortgage if they want to buy a house or receive student loans if they want to attend college. Thus, unlike almost all other business relationships, consumers who are unhappy with the actions of a reporting agency cannot vote with their

feet – they cannot remove the information or take their business elsewhere.

In this way, the reporting industry is almost quasi-governmental in nature, keeping files on almost every adult American whether they like it or not. The lack of choice whether to participate in the reporting system is also similar to a consumer's relationship with a public utility, yet the consumer reporting industry is not nearly as well regulated as a public utility. Apart from the very limited resources of the FTC, the major enforcement structure to "regulate" the consumer reporting industry is the private consumer.

Thus, while creditors can choose to switch between agencies if they wish, consumers are captives of the reporting agencies. Traditional competitive market forces therefore provide little incentive for reporting agencies to incur the costs to institute new procedures that ensure information is accurate or to undertake investigations to correct errors, since these activities primarily benefit consumers. Only the FCRA itself compels such behavior. Petitioners' invitation to dilute the FCRA's statutory penalties would weaken the only realistic protection that prevents the reporting agencies from ignoring the consumers whose lives can be ruined by incorrect information.

In contrast, by construing the remedy provisions, as Congress intended, to meaningfully penalize those who choose to violate the FCRA, the FCRA provides "optimal deterrence." Michael L. Rustad, *Punitive Damages in Cyberspace: Where in the World is the Consumer?*, 7 Chap. L. R. 39, 93 (2004). "Ordinary damages are an insufficient deterrent where the gain to the defendant exceeds any compensable injury." *Id.*

3. The FCRA's Private Remedies Are Often a Consumer's Only Recourse When Information Is Misused or Erroneously Reported

In many circumstances, the § 1681n(a) damages that Petitioners are trying to restrict are the only effective remedy against a reporting agency, furnisher, or user. Consumers may not be able to redress these privacy injuries by suing in tort because Congress granted agencies, users, and furnishers qualified immunity from most such state-law causes of action. Section 1681h(e), for instance, eliminates defamation, invasion of privacy, and negligence actions except as "to false information furnished with malice or willful intent to injure such consumer." *See also* § 1681t (preempting a comprehensive list of state laws).

Criminal liability is virtually nonexistent, except under § 1681q (knowingly and willfully obtaining information from a consumer reporting agency under false pretenses) and § 1681r (applying only to the reporting agencies' employees). The general criminal provision (§ 1681q) originally was interpreted by the courts to allow civil recovery under 1681n. *See e.g. Zamora v. Valley Federal S&L Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987). In 1996, Congress endorsed that approach when it copied the § 1681q "knowingly and willfully" language wholesale into § 1681n(a)(1)(B).

4. Petitioners Deliberately Took a Calculated Risk When They Ignored the Contrary FTC Staff Opinion

Amici have no special interest in the resolution of Petitioners' culpability in this matter once the Court establishes the standard for willfulness. It is striking, however, that Petitioners seek to present this case as nothing more than an innocent, harmless, and good faith

disagreement over an arcane and irresolvable (at the time) question of law for which their mistaken choice of one reasonable interpretation over another should not result in penalty damages. GEICO Brief, at 1-2. The available evidence, in fact, suggests another reasonable conclusion: that Petitioners knew their "interpretation" of § 1681a(k)(1)(B)(i) was not credible but decided to ignore the March 1, 2000, FTC staff opinion and their own internal candid assessment to the contrary, using the guise of plausible legal deniability in order to overcharge their customers and conceal the truth from them.

Under the CCPA, courts reject attempts like those of Petitioners to use self-induced errors of law to justify engaging in sharp business practices, absent determination by the trier of fact on the issues of good faith, knowledge, motive, and intent. *See Johnson v. Riddle*, 443 F.3d 723, 727-32 (10th Cir. 2006) (reversing grant of summary judgment under the FDCPA on debt collector's good faith, mistaken error of law defense to collecting excess charges). Furthermore, Petitioners' decision to ignore an FTC staff opinion squarely on point is a troubling and irresponsible practice that cannot be countenanced and that must be undertaken only at the actor's peril. Petitioners were on notice of the proper meaning of § 1681a(k)(1)(B)(i) and made a conscious decision to disregard it. Indeed, GEICO initially fully complied with § 1681a(k)(1)(B)(i) but actually abandoned that policy in favor of non-compliance. (Brief of the United States as Amicus Curiae, at 4). As the Court said long ago in the general context of consumer protection, "it does not seem 'unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.'" *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965) (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952)).

5. The Industry Can Show No Harm From Enforcement of FCRA Penalty Damages

Petitioners and their Amici cannot point to a single example where a final award of § 1681n(a) statutory or punitive damages has been even arguably excessive. Their stated fears and alarmist claims of mammoth awards instead are speculative at best, have no foundation in fact, and present no basis for the Court to take the preventive action to undercut § 1681n(a) that these unfounded claims are calculated to promote. If Petitioners' position is sustained, the participants in the consumer reporting industry will be given a green light to conduct business with little concern about meaningful private enforcement of statutory duties and no concern for the kind of enforcement that would deter violations or encourage compliance.

Given the nature of the injury to privacy, the importance of accurate credit reports, and the near exclusivity of the FCRA's remedies, any weakening of § 1681n(a) remedies would dissuade reporting agencies, furnishers, and users from valuing consumer privacy and instead would encourage strategic behavior to flout the FCRA's protections, as Petitioners may have done here. Minimizing the consequences for violating the FCRA would upset the balance between commerce and privacy that Congress sought to strike and would dissolve the legal barriers consumers have against prying eyes that want to view and exploit their individual information without any entitlement to do so. Consumers would be left with mere paper rights.

C. Vigorous Private Enforcement is Essential Because the Big Three Have Failed to Take Steps to Abate Inaccurate Reporting

1. The Credit Reporting System is Rife with Errors

Unfortunately, despite the intent of Congress in enacting the FCRA, the consumer reporting system does

not provide accurate information to its users. In the deliberations that culminated in the 1996 FCRA amendments,[6] Congress was presented with staggering statistics that nearly half of all credit reports (48%) maintained by the Big Three contained inaccurate information and nearly one out of five (19%) contained errors that could adversely affect the consumer's eligibility for credit. S. Rep. 103-209, at 3. More recent information shows a remarkable lack of improvement. Nat'l Ass'n of State PIRGs, *Mistakes Do Happen: A Look at Errors in Consumer Credit Reports* 11 (2004) (revealing that 25% of credit reports studied contained "serious errors").[7]

Despite the extraordinary economic and personal benefits at stake, the Big Three conduct their business with far too little regard for the inordinate personal price of their failure or for the mandates imposed by Congress to cure the agencies' shortcomings. *See, e.g., Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610-11 (7th Cir. 2005) (noting the court's sympathy with the consumer's "frustration" and identifying Experian's "systemic problem" in resolving consumer disputes); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 224-26 (3d Cir. 1997) (criticizing inadequate reinvestigation procedures); *Federal Trade Comm'n v. TRW Inc.*, 784 F.Supp. 361 (N.D. Tex. 1991) (entering a comprehensive consent order attempting to correct systemic FCRA noncompliance). The combined tools of adverse action notice, free

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[6] Consumer Credit Reporting Reform Act of 1996, Title II, Subtitle D, Ch. 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (Pub. L. No. 104-208) (Sept. 30, 1996).

[7] Available at <http://uspirg.org/home/reports/report-archives/financial-privacy – security/financial-privacy – security/mistakes-do-happen-a-look-at-errors-in-consumer-credit-reports>.

credit report, and dispute procedures are designed to correct these deficiencies.

2. The Reporting Industry Has Done Nothing to Fix Preventable Errors

The principal sources of the massive erroneous reporting are notorious and readily categorized: errors occur overwhelmingly as a result of 1) inaccurate information provided to the reporting agencies by furnishers, 2) the reporting agencies' over-inclusive matching algorithms that merge the profiles of two consumers with similar personal identifiers, and 3) an appalling indifference by the consumer reporting agencies to these known, preventable, and eminently correctable problems.

Significant impediments to correcting embedded erroneous information exist in the consumer reporting system. One defect of the consumer reporting system is the failure of the Big Three to exercise virtually any quality control over the information initially provided to them by furnishers. Until and unless a consumer lodges a formal dispute challenging the accuracy of information already published, the Big Three blindly rely on furnishers and provide no oversight of the quality of the information being reported. *See Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994).

This unquestioning acceptance and re-publication of furnisher information invites abuse. A well known truism is that reporting a debt to a reporting agency is a "powerful tool designed, in part, to wrench compliance with payment terms from" the alleged obligor. *Rivera v. Bank One,* 145 F.R.D. 614, 623 (D.P.R. 1993). In light of the available financial rewards, it is not surprising that some creditors are content to "slam" an innocent consumer's credit report, that is, furnish wrong information to reporting agencies to pressure a non-obligor to make payment

for the debtor who is actually responsible. *E.g., Johnson v. MBNA America Bank, NA,* 357 F.3d 426, 428-29 (4th Cir. 2004).

Another recurring furnisher abuse that results in inaccurate reporting is the "re-aging" of obsolete debts. This problem has grown particularly prevalent and profitable in recent years with the emergence of a multi-billion dollar distressed debt industry that buys, sells, and re-buys large portfolios of defaulted and time-barred debt for pennies on the dollar and then duns vulnerable consumers for inflated sums. The FCRA requires most consumer debts to be deleted from a credit report after seven years from the date of charge-off. § 1681c(a)(4). "Re-aging" occurs when these "scavenger" debt buyers purposefully misrepresent the date of charge-off to fall within the seven-year period, thereby resurrecting long dormant and nearly worthless debts with the simple act of false credit reporting. The FTC has tried to rein in this practice,[8] but the "re-aging" abuse continues at astounding levels.

Additional erroneous credit reporting results from the practice of merging the reports of two (or more) consumers with similar identifying information. This problem has plagued the reporting agencies since the FCRA was enacted, if not earlier. *See Thompson v. San Antonio Retail Merchants Assoc.*, 682 F.2d 509, 510-13 (5th Cir. 1982) (per curiam) (reporting agency negligently mixed the files of plaintiff William Douglas Thompson, III, with William Daniel Thompson, Jr.) In the 25 years since the problem

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[8] The FTC has brought enforcement actions over re-aging against two debt collectors, including one of the nation's largest debt collection firms. *United States v. NCO Group, Inc.*, Civ. No. 922-3012, *see* <www.ftc.gov/opa/2004/05/ncogroup.htm>, and *United States v. Performance Capital Management* (Bankr. C.D. Cal 2000), *see* <www.ftc.gov/opa/2000/08/performance.htm>.

was publicly identified as a systemic flaw, the Big Three have refused to correct their computer programs that decide how to link an individual consumer with the information maintained in their databases to create an actual credit report. *Federal Trade Comm'n v. TRW Inc.*, 784 F.Supp. at 362-63.

All three reporting agencies' systems are programmed to sort the information received from their 40,000 furnishers into a single credit report belonging to one individual whenever two of four designated identifiers associated with the data match: name, address, social security number, or date of birth. The systemic problem is that the Big Three use a "partial matching logic" that does not require an actual match of these identifiers but only a match of similar information. For example, this "partial matching logic" associates an individual with data when only seven of nine digits in a social security number match. This decision to identify a person based on only seven of nine numbers is particularly counterproductive since the social security number is the only truly unique identifier among the four. Merely requiring a full social security number match could end the mixed file phenomenon, still the Big Three refuse to implement even an eight of nine matching protocol.

In addition, the "partial matching logic" matches addresses with no more than the same state of residence and considers names to match by discounting variations such as spelling, middle names or initials, common nicknames, generational designations (Jr., Sr., III, etc.), and even completely different last names (to accommodate name changes after marriage). *See Apodaca v. Discover Fin. Servs.*, 417 F.Supp.2d 1220, 1224 (D.N.M. 2006). This "partial matching logic" literally invites the computer to combine the credit reports of two individuals into one. *See McKeown v. Sears Roebuck & Co.*, 335

F.Supp.2d 917, 924-27 (W.D. Wis. 2004) (documenting plaintiff James McKeown's ordeal to correct reporting agencies' file merger with deceased consumer James N. McOwen). Simply tightening the matching algorithms would eliminate an entire class of faulty reporting and enhance the accuracy that is so important to our credit system.

Readily identifiable inconsistencies on the face of individual credit reports instantly expose errors, yet recent cases have revealed that the reporting agencies have suppressed the fact that there are "easily available . . . procedure[s] that would greatly improve accuracy at a minimal cost." *O'Brien v. Equifax Info. Servs., LLC*, 382 F.Supp.2d 733, 739 (E.D. Pa. 2005).[9] Because the Big Three avoid implementing these and other reforms, the role of consumers acting to protect themselves is more crucial than ever. The adverse action notice is precisely tailored to this end.

3. The Consumer Reporting System Itself Has Exacerbated the Current Identity Theft Crisis

In 2003, Congress amended the FCRA by enacting the Fair and Accurate Credit Transactions Act (FACTA), Pub. L. No. 108-159 (2003). Title I of FACTA, entitled Identity Theft Prevention and Credit History Restoration, addresses the identity theft crisis that in Congress's judgment had "reached almost epidemic proportions in recent years." H.R. Rep. No. 108-263, at 25 (Sept. 4, 2003). The most important new FACTA duties imposed on

[9] The *O'Brien* litigation revealed that the reporting industry had available the precise capability that Experian had refused to use in *Sarver v. Experian Information Solutions*, 390 F.3d 969 (7th Cir. 2004).

the reporting agencies are not proactive and instead are triggered only when consumers notify an agency of suspected fraud. *See, e.g.*, 1681c-1 and c-2. As a result, the Big Three unfortunately continue to ignore facially conflicting information that could identify a compromised credit report, particularly the anomalous billing address that must be established to commit and conceal the fraud.

Theft of identity occurs when an impostor poses as someone else and applies for and receives credit on the basis of another's good credit standing. The impostor then makes purchases, obtains credit cards, and takes out loans using the dishonestly obtained credit approvals that are all too easily obtained and leaves the victim facially responsible for the resulting financial obligations. Worse yet, the scam saddles victims with the arduous process of ascertaining what happened to them and of obtaining information to prove their innocence and to restore their good names. Aside from the dollar costs to businesses and individuals, one scholar estimates that consumers have lost nearly 600 million hours resolving identity theft problems over the last two years, contributing to the crime's "drag on the economy." Gary M. Victor, *Identity Theft, Its Environment and Proposals for Change*, 18 Loyola Consumer L. R. 273, 279 & n.34 (2006).

The ease with which impostors steal the identity of innocent victims is common knowledge and illustrates the allure of the scam. Typically, to obtain credit, impostors need only use the victim's social security number, while using a similar but different name and completely different remaining identifying information. Impostors use an alternate address (sometimes simply a mail drop) to receive the purchased items, credit cards, and billing statements. Victims therefore receive no notice that a

problem exists until they receive an FCRA and/or ECOA adverse action notice or are dunned for payment for the impostor's debts many months or even years later.

Concealing the fraud is essential to the thief. On average victims discover identity theft after 15 months, and at least 20% only learn of the problem after two years.[10] Even then, the victim still must determine what has transpired, often waiting weeks and months just to receive documents providing information about the accounts. This protracted process further prevents victims from taking remedial action and continues the nightmare as victims deals with demanding debt collectors and disbelieving creditors.

Information received by the reporting agencies almost always shows early evidence of obvious errors and indicia of fraud that the Big Three nevertheless ignore. The victims' records contain conflicting information, with one set revealing their real accounts, accurate addresses, and continued positive credit usage, and the other showing overused accounts with a lack of payments opened in a short time span, as well as the ever-present anomalous billing addresses. Still, Amici have seen no evidence that the Big Three have taken any action to use their comprehensive databases and state of the art computing power to effectively combat this scourge. Indeed, the Big Three have turned identity theft into a profit center to sell their credit-monitoring

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[10] *See* Federal Trade Commission, *Identity Theft Victim Complaint Data, Figures and Trends November 1999 through March 2001*, available at <http://www.consumer.gov/idtheft/reports/rep-mar01.pdf> and <http://www.consumer.gov/idtheft/charts/nov99-mar01.pdf>.

services that instead should be implemented as part of their core responsibilities to protect consumers' privacy.[11]

Significantly, although the Big Three disclose to users a consumer's file contents based merely on a purported match of a social security number, they do not disclose the file to consumers without additional indicia of proper identification. *See* § 1681h(a)(1). Given their parallel obligation pursuant to § 1681e(a) to provide reports only to users who have a legitimate purpose involving the subject consumer, one would have expected that these agencies would follow protocols with a similar level of scrutiny. *See* § 1681b(a). They do not. This "weakest link" creditor point of entry into the reporting system is all too well known to identity thieves, making the reporting system itself a target of opportunity.

D. Providing the Adverse Action Notice Here Will Ensure That Petitioners Do Not Keep Their Customers in the Dark When Congress Intended to Shed Light

The linchpin of the consumer oversight on which Congress built FCRA compliance is the adverse action notice. The notice is a direct link to the formal dispute process through which consumers may correct erroneous

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[11] As stated in the New York Times current series on identity theft, "It is not just criminals who are profiting from identity theft; financial institutions are making money, too. Fear of identity theft has helped give rise to a nearly billion-dollar business in credit-monitoring services sold by the major credit bureaus – companies like Equifax, Experian and TransUnion – as well as direct marketers and banks." Eric Dash, *Protectors, Too, Gather Profits From ID Theft*, December 12, 2006, available at <http://www.nytimes.com/2006/12/12/business/12credit.html?ref=nationalspecial2>.

information. § 1681i(a). The notice not only apprises consumers of the adverse action taken and thus the possibility of negative information on their report, but also must disclose the right to receive a free credit report from the responsible reporting agency under § 1681j(b) and summarize the process to initiate the formal dispute mechanism with the agency. § 1681m(a)(1)-(3). The FACTA amendments of 2003 placed an even greater emphasis on consumers' receipt of the adverse action notice that Petitioners now claim the FCRA does not mandate.

The adverse action notice is particularly important because, as discussed above, the consumer reporting system is plagued by errors. Failure to give the adverse action notice that Congress mandated to alert consumers to potential problems means that fewer errors are corrected and more unreliable information is disseminated to users.

Only when a consumer first finds inaccurate or incomplete information and then lodges a formal dispute with the reporting agency can errors realistically be corrected. § 1681i(a). The required notice of dispute to the furnisher from the reporting agency then triggers the furnisher's duty to conduct its own reasonable investigation of the challenged information and report the results back to the reporting agency under § 1681s-2(b). *See Johnson v. MBNA America Bank,* 357 F.3d at 429-32. Then the reporting agency must complete its own independent investigation of the dispute and finalize the remaining steps to meet its duties under § 1681i(a)-(d). Without an adverse action notice, this error correction procedure can never start.

Congress defined adverse action broadly in § 1681a(k) to advance the important public policies animating this essential consumer notification. Unlike Congress, Petitioners are unconcerned about the overall negative effect on the economy caused by inaccurate or incomplete information. Petitioners simply want to keep their customers in the dark. Petitioners apparently are not troubled that some of their customers will be denied the opportunity to know what is in their credit reports, to correct inaccurate or incomplete information, or to better appreciate their own credit habits and improve their credit status for the future.

Petitioners also show no concern that their failure to send an insurance adverse action notice will prevent some of their customers from discovering that they are victims of identity theft and from taking the immediate remedial measures that Congress deemed crucial to curbing the impact of this criminal epidemic. This notice is particularly important here since the complementary ECOA adverse action notice that is also sent when adverse action is taken in consumer credit transactions is not sent to insurance customers.[12] A significant number of Americans do not actively apply for credit on a regular basis. A great number of these individuals, however, periodically purchase insurance products, and for them the failure to

[12] As discussed in Section A.2, in addition to the FCRA, consumers have a separate right to an adverse action notice under the ECOA. § 1691(d). However, the right to a notice under the ECOA is limited to adverse action in "credit" transactions. § 1691(d)(6) (limiting ECOA adverse action to "credit" transactions). Thus, this separate right to an ECOA adverse action notice does not apply to insurance adverse action or other non-credit situations, leaving the FCRA the only basis for requiring an adverse action notice in these contexts.

receive an insurance adverse action notice would completely eliminate this theft of identity early warning system.

In addition, Petitioners are content that their customers will not learn that despite, for example, a pristine driving record, they are not receiving the best automobile insurance rate available because of a blemish on their credit report. To the contrary, Petitioners seem intent on depriving consumers of such empowering information essential to a free and efficient market. The possibility that these customers might, as Congress intended, correct or improve their credit standing is seemingly unimportant to Petitioners; and the certainty that some customers, if armed with accurate information, would take their insurance business elsewhere and pay less may well be the anti-competitive force driving Petitioners' decision not to provide adverse action notices.

E. The Framework in Which This Case Arises Does Not Represent a Typical FCRA Case

Amici wish to emphasize that the parties' debate here over willfulness in the context of the proper interpretation of the statutory adverse action definition is not representative of the usual FCRA case. Typical individual FCRA cases do not, as here, allege a disclosure violation of § 1681m(a) but focus instead on accuracy issues. Specifically, most FCRA cases that raise § 1681n(a) liability ask whether a reporting agency has breached its duty to report accurate information pursuant to § 1681e(b) or whether a reporting agency or furnisher has conducted a reasonable investigation of the accuracy or completeness of information that a consumer has specifically disputed, in violation

of § 1681i (for reporting agencies) and § 1681s-2(b) (for furnishers).

Thus, answering the question here whether "there was an objectively high risk that GEICO's construction of the law was wrong," as framed by the United States as Amicus Curiae (Brief, at 30), would not normally be appropriate in cases alleging a violation of §§ 1681e(b), 1681i, or 1681s-2(b). Instead, these cases typically ask first whether the defendant had notice or was aware of the claimed error or problem and whether it breached the duty of reasonable care to correct it; if so, a plaintiff will have established liability for negligent noncompliance under § 1681o. *See, e.g., Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333-34 (9th Cir. 1995); *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 664 (7th Cir. 2001). Then, in order to pursue the § 1681n(a) remedies, the plaintiff must show that the defendant's breach was not merely unreasonable but was done with the requisite disregard of its duty in order to establish willfulness. *See, e.g., Soghomonian v. United States*, 278 F.Supp.2d 1151, 1160-62 (E.D. Cal. 2003); *Apodaca*, 417 F.Supp.2d at 1228-34. Whether that standard includes reckless disregard or is limited to conscious disregard is, of course, the issue before the Court; but the instant formulation of whether a defendant knew, should have known, or disregarded the risk that it was misconstruing the law would not be readily transferable to these other types of individual accuracy cases.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

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No. 06-84 and 06-100

In the Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, et al.,

Petitioners,

v.

CHARLES BURR, et al.,

Respondents.

GEICO GENERAL INSURANCE COMPANY, et al.,

Petitioners,

v.

AJENE EDO, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the States of Oregon, Arizona, Arkansas, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Minnesota, Missouri, Montana, New York, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin and Wyoming
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QUESTIONS PRESENTED

The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, requires users of credit reports, including insurance companies, to provide notice to consumers against whom they take any "adverse action" based in whole or in part on any information contained in a credit report, and to inform the consumer of the right to obtain a copy of the report and to challenge its contents. 15 U.S.C. § 1681m(a). When a user of credit reports violates the notice requirements "willfully," as opposed to negligently, it may be liable for punitive damages. 15 U.S.C. § 1681n(a). The questions presented are:

1. Whether an insurance company takes an "adverse action" under § 1681m(a) by charging an insurance customer a higher insurance rate based at least in part on his or her credit report, when the customer would have been charged a lower rate if his credit information had been more favorable.

2. Whether, in order to have "willfully" violated the Fair Credit Reporting Act's requirements, a company must have actual knowledge that it is violating the Act's requirements, or if it is sufficient that the company act in reckless disregard of a consumer's rights under the Act.

3. If reckless disregard is sufficient to establish willfulness, whether a company may avoid further scrutiny into whether it willfully violated the Act by relying on a merely "colorable" interpretation of what constitutes an "adverse action" triggering the Act's notice requirement, as opposed to establishing that its erroneous interpretation was objectively reasonable.

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INTEREST OF THE STATE *AMICI*

The undersigned Attorneys General submit this brief on behalf of their respective States and pursuant to Rule 37.4. Congress enacted the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, to protect consumers from flaws in the credit reporting system and to improve the integrity and reliability of credit reports for business purposes. To those ends, the Act gives consumers the right, among other things, to receive notice from companies that consider a consumer's credit report as one basis for taking an adverse action against him or her, 15 U.S.C. § 1681m(a), and federal agencies may seek damages for negligent or willful violation of the Act's requirements. 15 U.S.C. § 1681n(a), 15 U.S.C. § 1681o; 15 U.S.C. § 1681m(h)(8). The States retain enforcement rights under the FCRA generally, 15 U.S.C. § 1681s(c), although the FCRA preempts state fair credit reporting laws to the extent they are inconsistent with the federal Act. 15 U.S.C. § 1681t. Accordingly, the State *amici* have a strong interest in the proper construction of provisions in the Act pertaining to "adverse actions" and "willfulness."

SUMMARY OF ARGUMENT

I. The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, requires users of credit reports to notify consumers when they have used a consumer's report to take any adverse action against him or her. 15 U.S.C. § 1681m(a). An adverse action, as the Act defines it, includes an increase in any charge for any insurance, existing or applied for. 15 U.S.C. § 1681a(k)(1)(B)(i). In determining whether it had taken an adverse action against a consumer based on his credit report, GEICO Companies

compared the rate it charged him based on his actual credit report with the rate it would have charged him if he had had a neutral or average credit score. Where, as in Edo's case, the rate charged would not have been higher based on consideration of an average credit score, GEICO determined that it had not taken an adverse action against the consumer and therefore did not provide an adverse action notice.

GEICO erroneously interpreted its duty to provide adverse impact notices. The purpose of the adverse action notification requirement is to alert consumers to potential mistakes in their credit reports so that they may investigate and, if appropriate, challenge the information. But GEICO's policy would not alert a person with good credit that he would have received a better insurance rate if he had had better credit, and thus would deny him an opportunity to correct any mistakes in his report. Nothing in the Act limits adverse actions to situations in which a person with an average or poor credit score is charged a higher insurance rate based in part on his report. Thus, a company takes adverse action against a consumer whenever a more favorable credit report would result in a lower insurance rate.

II. In the civil context, willfulness may encompass not only a knowing violation of the law, but also reckless disregard of whether one's conduct is unlawful. The context, structure, and purposes of the FCRA demonstrate that Congress intended a willful violation of the Act's requirements to include reckless disregard for the rights of consumers. That was an accepted view of the *mens rea* required for willful violation of civil statutes at the time

the FCRA was enacted. Moreover, when Congress wished to require a knowing violation, rather than mere willfulness, in order to impose liability, it used that term. The FCRA represents Congress's attempt to balance the benefits to users of consumer credit reports with the rights of consumers to notice and other protections. Construing willfulness to include a company's reckless disregard of a consumer's rights under the Act best effects that balance and Congress's intent.

III. Because some of GEICO's and Safeco's interpretations of their statutory duties to consumers were implausible, the Ninth Circuit properly determined that they were not entitled to summary judgment on the issue of whether they violated the Act's provisions willfully. Absent other evidence of willful noncompliance, when a company acts on an interpretation that is reasonable but erroneous, willfulness cannot be found. On the other hand, when a company reaches an implausible interpretation of its duties and that interpretation results in a violation of consumer rights, further inquiry into the company's subjective good faith is appropriate. Having received the benefit of use of consumer credit reports, a company should not escape liability for willful conduct, as a matter of law, based solely on its advancement of a "colorable" argument in support of its action. Requiring companies in a highly regulated industry to make a good faith attempt to determine its duties to consumers is not an onerous standard.

ARGUMENT

I. An insurance company takes an "adverse action" against a consumer whenever, after considering the consumer's credit report, it charges the consumer a higher rate than it would have charged, had the consumer's report been more favorable.

15 U.S.C. § 1681m(a) imposes on users of consumer credit reports the duty, among others, to provide notice to all consumers against whom they have taken an adverse action based in any part on information obtained in their consumer credit reports. During the relevant period in this case, the GEICO Companies deemed an action with respect to an individual's automobile insurance rates "adverse," therefore triggering the notice requirement, only if the rate charged was greater than it would have been if the individual's credit information had been neutral, meaning average. *Reynolds v. Hartford Financial Services Group*, 435 F.3d 1081, 1089, 1092-93 (9th Cir. 2006). The Ninth Circuit held that GEICO's interpretation and resulting policy violated the Act, because an adverse action takes place whenever a consumer (whose credit report was considered) would have been charged less for his insurance, had his credit information been more favorable. *Id.* at 1093. That followed, the Ninth Circuit reasoned, because those consumers with higher-than-average credit scores, as well as those with average or below-average scores, are entitled to know when a better rating would result in their being charged less for their insurance. *Id.*.

The Ninth Circuit was correct. The FCRA defines an "adverse action" to include, in part, "an increase in any

charge for [insurance] * * * applied for" based on the information in a credit report. 15 U.S.C. § 1681a(k)(1)(B)(i). Nothing in that language limits adverse actions to ones in which the consumer is charged a higher rate than he or she would have been charged, had the consumer had an above-average, rather than below-average, credit score. In other words, as the Ninth Circuit pointed out, a consumer is entitled to notice whenever he or she would have received a more favorable rate based on a better consumer credit report. In the cases of consumers with better-than-average credit reports, comparing the rates they are charged to the rates charged individuals with average credit scores ignores that those with excellent scores may nevertheless suffer higher rates than they should, based on mistakenly low credit ratings.

Construing "adverse actions" broadly to include all cases in which a consumer would have been charged less for his insurance, had his credit information been more favorable, is the only interpretation consonant with the purposes of the FCRA's notice requirements. Congress enacted the FCRA to protect consumers from flaws in the credit reporting system and to improve the integrity and reliability of credit reports. *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001); S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969). To those ends, the Act gives consumers the right to see their credit reports; sets forth procedures by which consumers may challenge and correct their reports; and requires that users of reports give affected consumers notice of any adverse actions taken based on the reports. 15 U.S.C. § 1681g; 15 U.S.C. § 1681i; 15 U.S.C. § 1681m(a). Under GEICO's narrow reading of "adverse action," a person may be charged more for his

or her insurance based on an inaccuracy in his or her credit report, yet never receive notice of that adverse action and thus never have reason to challenge or correct the report. Such a reading is not supported by the text of the Act, and it serves to defeat Congress's purpose of improving credit report reliability: An adverse-action notice may be the only practical way for a consumer to learn that the credit report used by the insurance company was erroneous and therefore take steps to correct it.

GEICO's contention that requiring adverse-action notices in situations like Edo's would confuse and desensitize consumers to the notices' import is unpersuasive. (*See* GEICO Br. 22). It is not difficult to tell a consumer that had his credit score been better, he would have received a better insurance rate. And if a consumer believes that he has impeccable credit, he is entitled to be alerted to the fact that his credit report reflects otherwise. Given that for most individuals, applying for or changing their insurance policies is not a daily occurrence, there is no genuine cause for concern that consumers will be flooded with too much information.

II. An insurance company that violates the FCRA in reckless disregard of a consumer's rights acts "willfully" for purposes of 15 § U.S.C. 1681n.

The Ninth Circuit also held that when an insurance company intentionally acts either with knowledge or in reckless disregard of a consumer's rights under the FCRA, its violation is willful, making it liable for punitive damages. *Reynolds*, 935 F.3d at 1098. The Ninth Circuit determined that that definition "best comports" with this Court's consistent statements in the context of

civil, as opposed to criminal, liability. *Id.* (citing, *e.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985)). Further, as the Ninth Circuit explained, that approach "best furthers the purposes and objectives of the Act." *Reynolds*, 935 F.3d at 1099. The court distinguished a negligent violation—"a truly excusable inability to predict future developments in the evolving construction of a statute by the courts"—from "noncompliance even though the answer to a previously undecided question is objectively apparent," which exhibits willfulness. *Id.*

That conclusion is also correct. First, as the Ninth Circuit observed, willfulness consistently has been construed differently, depending on whether that term is used in a civil or criminal context. In the civil context, willfulness means both knowing and reckless disregard of a defendant's legal obligations, particularly where the action is taken to enforce a party's compliance with duties designed to protect federal statutory rights. *See, e.g.*, *Thurston*, 469 U.S. at 128; *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (willful violation of Age Discrimination in Employment Act encompasses "reckless disregard for the matter of whether [a party's] conduct was prohibited"); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (same under Fair Labor Standards Act); *United States v. Illinois Cent. R. Co.*, 303 U.S. 239, 242-43 (1938) (in civil context, willful includes attitude of a defendant who is "plainly indifferent" to a statute's requirements). The Ninth Circuit's similar conclusion in the context of the FCRA is plainly consistent with those previous holdings.

Indeed, construing willful non-compliance to include reckless disregard of the Act's consumer protection provisions is compelled by the Act's text. Congress is presumed to have said what it meant and meant what it said. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Interpretations that render statutory language superfluous are disfavored. *Id.* at 253. In the case of the FCRA, when Congress wished to require proof of a knowing violation in order to impose liability, it did just that. *See, e.g.*, § 1681n(a)(1)(B) (imposing liability for actual and punitive damages to consumers for "obtaining a consumer report under false pretenses *or knowingly without a permissible purpose*"; emphasis added); § 1681n(b) (imposing liability for actual damages to consumer reporting agency not less than $1,000 on any person "who obtains a consumer report from a consumer reporting agency under false pretenses *or knowingly without a permissible purpose*"; emphasis added). Notably, in § 1681q, Congress provided criminal liability for "[a]ny person who *knowingly and willfully* obtains information on a consumer * * * under false pretenses." 15 U.S.C. § 1681q (emphasis added). Thus, Congress made a conscious choice to require *knowing and willful* conduct for purposes of criminal liability under that section, while determining that the lesser standard of willfulness—knowing *or reckless* disregard of consumer rights—is sufficient to establish civil liability for noncompliance under § 1681n(a).

That standard is also implicit in the structure of the FCRA. The Act imposes both benefits and responsibilities on users of consumer credit reports. Insurance companies may use consumer credit reports in determining

the rates it will charge to issue an insurance policy to an individual, 15 U.S.C. § 1681b (a)(3)(C), but in exchange, the company must notify individuals of any adverse action taken, based in some part on those reports. 15 U.S.C. § 1681m(a). When a company fails to comply with its statutory duties, it undermines Congress's goal to improve the accuracy and fairness of consumer credit reports. Additionally, it creates an imbalance of power between the company and the consumer. In that context, demanding a relatively high standard of care for violations of consumer rights makes sense. As part of a highly regulated industry, insurance companies should not be permitted to obtain the benefit of using consumer credit reports as permitted under the FCRA, while recklessly disregarding their statutory obligations to consumers at the risk of only minimal financial liability.

As the Ninth Circuit opined, to conclude otherwise would "create perverse incentives" for credit report users to pursue a policy of deliberate ignorance of the law in order to avoid liability for punitive damages. *Reynolds*, 435 F.3d at 1099. Under such a policy, an insurance company "could make the economic calculation that it is less expensive to simply ignore the law, stonewall consumers, and then pay compensatory damages for negligent violations that give rise to litigation, rather than open its eyes and pay the cost" of providing adverse-action notices to those entitled to them. *See Apodaca v. Discover Financial Services*, 417 F. Supp. 2d 1220, 1220 (D.N.M. 2006) (noting similar incentive for credit-reporting agencies). Congress clearly chose to impose liability for reckless disregard of consumer rights, because it provided damages for both negligent and willful

noncompliance. Given that "Congress did not intend to enable mass-users of credit reports to evade meaningful liability for repeated violations of their 'grave responsibilities' under the FCRA by sticking their heads in the sand and pleading ignorance of the law," such reckless disregard should be deemed willful, not merely negligent. *See Mathews v. Gov't. Employees Ins. Co.*, 23 F. Supp. 2d 1160, 1164 (S.D. Cal 1998).

III. To avoid further scrutiny into a company's subjective intent in violating a consumer's rights under the FCRA, the company must show that its interpretation of a previously unconstrued statutory requirement was reasonable, not merely "colorable."

The remaining question is when a company should be entitled to summary judgment based on lack of its willfulness in violating consumer rights under the FLCA. On that issue, the United States' *amicus* brief argues that the Ninth Circuit misapplied the correct standard for reckless disregard of consumer rights under the Act. According to the United States' *amicus* brief, "recklessness entails action or inaction 'in the face of an *unjustifiably high risk* of harm' or unlawfulness[.] (United States Br. 21) (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)) (emphasis added in United States' *amicus* brief). The United States argues that "reckless disregard in the civil context is, at bottom, an objective standard." (United States Br. 22). Further, that brief argues, the Ninth Circuit conflated the initial question of the objective reasonableness of GEICO's interpretation of an "adverse action" into the ultimate question of whether GEICO acted in subjective

good faith. (United States Br. 23-24). The United States *amicus* brief concludes that because "courts must undertake an objective inquiry to determine whether the defendant's conduct reflected a *colorable* interpretation of the law," and because the circumstances—including that the meaning of an "adverse action" was one of first impression—did not pose an objectively high risk that GEICO's interpretation of the FCRA's notice requirement was wrong, the trial court correctly granted the company summary judgment. (United States Br. 22, 29-30).

The State *amici* agree that recklessness requires, as an initial matter, an inquiry into the objective reasonableness of a party's conduct. *See, e.g, Farmer*, 511 U.S. at 836-37. But in this case, contrary to the United States' understanding, the Ninth Circuit *did* consider the objective reasonableness of GEICO's conduct, holding that "at least some of [the company's] interpretations [were] implausible." *Reynolds*, 435 F.3d at 1099. Having made that objective determination, the question before the court was what that meant for GEICO's summary judgment motion. The court determined that, because GEICO had reached at least some implausible interpretations of its statutory obligations, it was appropriate to remand to the district court to inquire further into the company's subjective good faith.[1] *Reynolds*, 435 F.3d at 1099.

[1] Similarly, in Safeco's case, the Ninth Circuit held that the defendant companies' argument that their conduct was not willful failed in light of *Edo. Spano v. Safeco Corp.*, 140 Fed. Appx. 746, 2005 U.S. App. LEXIS 16308 (9th Cir. 2006).

Thus, the United States' disagreement with the Ninth Circuit does not appear to be so much with the order of inquiry—*i.e.*, whether to inquire into the objective reasonableness of the defendant company's conduct before examining its subjective good faith—as it is with what objective standard to apply to the company's interpretation of its statutory duties. As the United States' *amicus* brief points out, the Ninth Circuit indicated that where a company has "diligently and in good faith attempted to fulfill its statutory obigation and to determine the correct legal meaning of the statute and has thereby *come to a tenable, albeit erroneous, interpretation* of the statute," it "will not have acted in reckless disregard of a consumer's rights," as a matter of law. *Reynolds*, 435 F.3d at 1099. (Emphasis added). By contrast, in the apparent view of the United States, a company should escape liability for willful violation of a consumer's rights when, in the face of a requirement that has not previously been construed by a court, a company acts on a "colorable" interpretion of its duties. In the view of the State *amici*, in the specific context of the FCRA, as opposed to a criminal or some other civil action, the Ninth Circuit's rule is the better one.

As noted, the insurance industry is highly regulated. Like consumer reporting agencies, such users of reports have "grave responsibilities" under the FCRA. *See* 15 U.S.C. § 1681(a)(4). In light of the benefits that the Act accords users of reports, it is not overly onerous to require them to make a good faith effort to correctly determine their statutory responsibilities. In other words, although merely coming to an erroneous intepretation of such duties does not establish a willful violation of the

Act, a company's reliance on a flatly implausible interpretation of its duties should trigger further inquiry into its subjective good faith.

Requiring only a "colorable" argument that a company has fulfilled its statutory duties should not be the test, even when the interpretive question is one of first impression. That would give companies too much leeway to consciously avoid their responsibilities under the Act, no matter how clear, and risk only minimal damages until a consumer or other actor forces the issue to resolution through litigation. A "colorable" interpretation may be highly likely to be erroneous, thereby posing a high risk that, in acting on it, the company will violate consumer rights. Accordingly, proffering only a "colorable" interpretation should not be sufficient to foreclose a finding that a company violated consumer rights with reckless indifference to the law.

Finally, as the Ninth Circuit observed, further consideration of a company's subjective good faith will not always equate with a finding that it has violated the Act willfully. Upon further inquiry, a number of factors may come into play in making that determination, including whether the company justifiably relied on the advice of counsel, whether its violations of the Act were isolated, as opposed to an established policy affecting many consumers, whether its relationships with particular consumers evidenced a hostility to obeying the law, and how company executives reached the decision. *See Reynolds*, 435 F.3d at 1099. The only question at this stage, however, is whether an insurance company should be allowed to avoid statutory or punitive damages under § 1681n as

a matter of law because it offered a merely colorable (and wrong) interpretation of one of its duties under the FCRA. Because the FCRA's purposes of increasing the accuracy and reliability of consumer credit reports is best furthered by requiring credit report users to make a good faith determination of their statutory duties to consumers, the Ninth Circuit properly determined that neither GEICO nor Safeco was entitled to summary judgment.

Although numerous states have enacted, or may enact in the future, statutes intended to further fair credit reporting, the FCRA is this nation's central and primary mechanism for protecting consumer rights in the credit report arena. The responsibilities that the Act imposes on credit report users should be construed in a manner that takes into account the consumers' weighty interests in reports that are accurate and fairly compiled. Companies that do not make a good faith effort to comply with the Act's adverse-action notice requirement should not escape meaningful liability by acting on a strained and narrow interpretation of that responsibility. Reliance on an implausible and erroneous interpretation should be sufficient to trigger further inquiry into whether a company has violated the Act willfully.

CONCLUSION

For the reasons stated above, the Ninth Circuit's judgment should be affirmed.

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December 18, 2006

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APPENDIX A

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Nos. 06-84 & 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR, *et al.*,

Respondents.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Property Casualty Insurers Association of America ("PCI") respectfully submits this *amicus curiae* brief in support of petitioners GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company; and Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon (collectively "petitioners").[1]

INTEREST OF *AMICUS CURIAE*

PCI is a trade group dedicated to representing its member companies' interests before governmental bodies and state and federal courts. PCI's members include more than 1,000 property and casualty insurance companies that together account for $184 billion in direct written premiums, including 52% of all personal auto premiums and 39.6% of all homeowners premiums written in the United States.

PCI is familiar with the issues involved in this case, including the issues raised in petitioners' briefs. As those briefs demonstrate, this case presents several issues of first impression relating to the interpretation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, each of which is of critical importance to PCI's members and to the insurance industry as a whole. PCI and its member companies thus have a substantial interest in the outcome of the present action.

In PCI's view, one aspect of the Ninth Circuit's opinion in particular bears further briefing: the required contents of a valid adverse action notice under 15 U.S.C. § 1681m. PCI believes

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1. No counsel for any party authored this *amicus* brief in whole or in part, and no person or entity other than PCI made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this *amicus* brief, and their letters are on file with the Clerk of this Court.

its *amicus* brief will be helpful to the Court in offering a somewhat different approach to this issue than do the parties' briefs and in providing data that underscore the significant negative consequences to the insurance industry and the insurance-buying public if the Ninth Circuit's opinion is allowed to stand.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion fashions entirely new content requirements for adverse action notices that threaten the very solvency of the insurance industry. These unprecedented requirements are unsupported by any authority and conflict with both the express language of 15 U.S.C. § 1681m ("section 1681m") and Federal Trade Commission directives written for the express purpose of advising insurers of their obligations under FCRA. These new notice requirements are vague in their scope and application and, given the realities of modern insurance underwriting practices, may be virtually impossible for insurers to satisfy. Moreover, imposition of these requirements threatens the insurance industry with potentially ruinous penalties and the prospect of continued litigation, especially when combined with the court of appeals' expansive, and erroneous, definition of "willfulness."

The detailed notice requirements adopted by the Ninth Circuit will also thwart one of Congress's primary objectives in enacting FCRA, which is to provide consumers with clear, intelligible information concerning their credit reports.

ARGUMENT

A. The "Minimum Requirements" for a Valid Adverse Action Notice Announced by the Ninth Circuit Are Not Supported by the Statutory Language and Are Inconsistent with the Governing Agency's Interpretation.

According to the Ninth Circuit's opinion, in order to comply with section 1681m, an adverse action notice must, "at a minimum, . . . communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action." *Reynolds v. Hartford Fin. Serv. Group, Inc.*, 435 F.3d 1081, 1095 (9th Cir. 2006); *see id.* at 1100. These hitherto unknown requirements conflict with the express language of the statute, run afoul of the dictates of prior case law, and are patently inconsistent with Federal Trade Commission advisory directives written specifically to inform insurers of their obligations under FCRA.

1. The Ninth Circuit's Interpretation of Section 1681m Conflicts with the Statutory Language and Has No Support in the Case Law.

The dual purposes of FCRA are to ensure the accuracy and fairness of credit reporting. 15 U.S.C. § 1681(a). More specifically, the Act is "intended to safeguard against the improper reporting of information on a credit report (either by the credit reporting agency or by the furnisher of credit information) and against the improper disclosure of a credit report." *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1074 (9th Cir. 2001); *see* 15 U.S.C. § 1681(b) (noting that one of FCRA's purposes is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . information in a manner which is fair

and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information").

In aid of this goal, section 1681m sets forth specific requirements for users of consumer reports. That section provides that any person who takes adverse action based in whole or in part on information contained in a "consumer report"[2] shall issue provide three specific types of information to the consumer, in "oral, written, or electronic" form: (1) notice of the adverse action; (2) contact information for the consumer reporting agency (together with a statement that the reporting agency did not make the decision to take the adverse action and cannot provide information concerning the action); and (3) notice of the consumer's right to obtain a copy of the consumer report and to dispute the accuracy or completeness of any information in the report.[3] 15 U.S.C. § 1681m.

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2. The Act broadly defines "consumer report" as any communication by a consumer reporting agency "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used . . . as a factor in determining the consumer's eligibility for," among other things, "insurance . . . to be used primarily for personal, family, or household purposes[.]" 15 U.S.C. § 1681a(d)(1).

3. Section 1681m(a) provides:

> If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall–
>
> (1) provide oral, written, or electronic notice of the adverse action to the consumer;
>
> (2) provide to the consumer orally, in writing, or electronically–

(Cont'd)

In considering whether the adverse action notices at issue here met these requirements, the Ninth Circuit went well beyond the mandate of the statute. Rather, as noted above, the court concluded that a valid notice must, "at a minimum," specifically state that an adverse action was taken; "describe" the action; "specify the effect" of the action on the consumer; and "identify the party or parties taking the action, and their respective role." *Reynolds*, 435 F.3d at 1095; *see id.* at 1100. None of these content requirements is found in section 1681m itself, and none can fairly be implied from the language of the statute. Further, the court imposed these requirements on its own, without any party briefing the issue.

(Cont'd)

> (A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and
>
> (B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and
>
> (3) provide to the consumer an oral, written, or electronic notice of the consumer's right–
>
> (A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and
>
> (B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

In support of its holding, the Ninth Circuit cited only *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir. 1983), a case that has virtually nothing to do with the issues involved here. In that case, Fischl applied for credit to finance the bulk of the purchase price of an automobile. The credit application was referred to General Motors Acceptance Corp. ("GMAC"), which obtained a consumer report on Fischl. After reviewing the application and consumer report, GMAC determined that credit should not be extended. It then sent Fischl a form letter advising him that his application had been rejected on the ground that "credit references are insufficient." In the portion of the letter designed to disclose the use of information from outside sources, GMAC marked "disclosure inapplicable." *Id.* at 145. Fischl subsequently learned that GMAC had in fact obtained his credit information and filed suit under FCRA.

Not surprisingly, the Fifth Circuit held that GMAC's purported notice failed to comply with section 1681m, since it misleadingly stated "disclosure inapplicable" instead of informing Fischl that GMAC had in fact relied on a consumer report in denying Fischl's loan application. *Id.* at 150. But that is all the *Fischl* opinion says: Other than to make plain that an adverse action notice cannot contain *untrue* information, the case does not even address the required content of such a notice – much less hold that an adverse action notice is invalid unless it contains the specific and detailed information required by the Ninth Circuit. Indeed, other than the Ninth Circuit here, no court in the country has ever interpreted section 1681m to impose such onerous requirements.

2. The Ninth Circuit's Interpretation of Section 1681m Conflicts with That of the Federal Trade Commission, the Agency Charged with Enforcing FCRA.

In 1996, Congress enacted amendments to the FCRA which directed the Federal Trade Commission ("FTC") – the

agency primarily responsible for enforcing FCRA (*see* 15 U.S.C. § 1681s(a); *Fischl*, 708 F.2d at 149 n.4) – to prescribe the content of notices and to provide a sample notice for users of credit reports. 15 U.S.C. § 1681e(d)(2). In response, the FTC has specifically addressed what information an insurer must provide a consumer in an adverse action notice. In stark contrast to the Ninth Circuit's interpretation, both the FTC's regulations and its advisory materials essentially track the express language of the statute and state that, to be effective, an insurer's adverse action notice need only include "the name, address, and telephone number" of the agency supplying the report; "a statement that the credit reporting agency that supplied the report did not make the decision to take its adverse action"; and a notice of the consumer's right to dispute the information. *See* 16 C.F.R. Part 601, App. C.; "FTC Facts for Business: Consumer Reports – What Insurers Need to Know" (FTC October 1998) (reproduced at PCI's Appendix ("PCI App.") at 1a); *see also* FTC Staff Opinion Letter, dated November 10, 1998, PCI App. at 4a (opining that section 615(a) of FCRA requires adverse action notices to contain "only the information specified" in the statute). Although this interpretation is not technically binding,[4] this Court has often held that considerable

4. In *Fischl*, the Fifth Circuit summarized the FTC's role in interpreting FCRA as follows:

> Although it does not possess substantive rule-making power, the FTC is authorized to enforce the FCRA, "except to the extent that enforcement . . . is specifically committed to some other government agency under [§ 1681s(b)]. . . ." §15 U.S.C. 1681s(a). . . . Due to the absence of express statutory authority to issue binding interpretations of the FCRA, which effectively deprives any such interpretation of the force of law, opinions disseminated by the FTC, whether in the form of its compliance manual or unofficial staff letters, are intended only to clarify the FCRA and are advisory in nature. *These opinions may nonetheless offer helpful guidance to the courts.*

708 F.2d at 149 n.4 (emphasis added).

respect should be accorded the "interpretation given [a] statute by the offices or agencies charged with its administration." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (quoting *Udall v. Tallmar*, 380 U.S. 1, 16 (1961)).

Prior to the decision below, no court had ever suggested, much less held, that an adverse action notice must contain the detailed content required by the Ninth Circuit. Nor can such a requirement be gleaned from a fair reading of FCRA itself. To the contrary, the only source of specific information concerning the "official" interpretation of this aspect of FCRA – the FTC's regulations and the advisory materials written specifically for insurers – detail a much simpler and straightforward response to consumers in the event of adverse action.

B. The Ninth Circuit's Notice Requirements Do Not Further FCRA's Purposes and Impose an Unreasonable Administrative and Economic Burden on Insurers.

As noted above, one of the primary goals of section 1681m is "to promote the accuracy of information in a consumer credit report." *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1334 (9th Cir. 1995); *see* 15 U.S.C. §§ 1681(a), (b). The Ninth Circuit's newly imposed "minimum" requirements are of no assistance whatever in achieving that end. To the contrary, and in contrast to the statutory requirements, the Ninth Circuit's requirements will serve only to deluge consumers with a quantity of information far removed from that intended by Congress – specifically, information designed to enable them to determine whether their credit information is accurate and, if not, how to correct it. At the same time, the new requirements impose an enormous operational burden on insurers.

Take, for example, the Ninth Circuit's requirement that the notice "specify the effect of the [adverse] action upon the consumer." *Reynolds*, 435 F.3d at 1095. This requirement is

impermissibly vague in scope and application, since it is impossible to determine what the phrase "specify the effect" means or what level of detail is necessary to satisfy this criterion.[5] Moreover, assuming an insurer could overcome this threshold hurdle, the complexities of modern insurance underwriting are such that many insurers will simply be unable to provide the information apparently required by the Ninth Circuit – or at least to do so in a form that consumers will understand.

To be sure, some insurers may use credit information in such a straightforward way that the "effect" of the adverse action will be easy to discern and explain – such as when an insured's premium rate is increased solely and directly because of information in his or her credit report. More often, however, the role of consumer reports in the rating process is much more complicated and nuanced, having both direct and indirect ramifications.

Insurance companies calculate premiums using various underwriting or rating factors. These factors can be affected in numerous ways by information contained in consumer reports. For example, many insurers use consumer report information to calculate an "insurance score," which is then used to place an applicant in a basic risk category or "tier," such as "preferred," "standard," or "nonstandard." Each of these tiers may have associated rating factors and may also, in turn, determine what other rating parameters are applied. Thus, the fact of a speeding violation (information that itself comes from a consumer report) may affect the "preferred" risk tier differently than the "nonstandard" risk tier. Similarly, an applicant's insurance score may determine whether an applicant is eligible for certain discounts or surcharges and, if so, the amount of those discounts and surcharges. This interaction among the various factors that

5. Thus, far from providing guidance as to FCRA compliance, the Ninth Circuit's notice requirements threaten to open a Pandora's box of new litigation.

go into the setting of premiums could make it literally impossible for an insurer to "specify the effect" of the "action" taken as a result of information derived from an individual policyholder's consumer reports.

The problem is further complicated by the fact that insurers may use information from a number of consumer reports (e.g., credit reports, motor vehicle reports, and others) in setting a premium or determining eligibility for coverage, making any meaningful explanation of the "effect" of the reports virtually impossible. Suppose, for example, a policyholder has "good" credit (as derived from a credit report) and one speeding violation. Through sophisticated statistical techniques, an insurer might be able to derive the *overall* rate impact of these two factors combined, but not be able to separate the impact of the good credit, on the one hand, and the speeding violation, on the other. Just how is the carrier to "specify the effect" of its action in these circumstances? And how is the consumer to understand this information as provided?

Similarly, the Ninth Circuit's requirement that an adverse action notice "identify the party or parties taking the action and their respective roles" has little to do with the ultimate aim of alerting consumers to their right to inspect their credit reports and, ultimately, to ensure accurate reporting. Because this new requirement could be read to require independent notices from affiliated companies, many consumers would receive multiple notices, as well as lengthier and more complex notices.

The end result is that, to satisfy the Ninth Circuit's notice requirements, insurers may be forced to provide consumers with an extremely complicated description of their underwriting practices, corporate structure and business practices. As noted by this Court in the context of disclosures required by the Truth in Lending Act, "meaningful disclosure does not mean more disclosure." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555,

568 (1980). Far from requiring clear, intelligible information designed to assist a consumer in determining whether his or her credit information is accurate and to correct it if it is not, the Ninth Circuit's opinion mandates a form of notice that is so complex and detailed that the key information contemplated by the statute will be all but lost.

C. The Decision Below Seriously Threatens the Continued Availability and Affordability of Personal Lines Insurance.

The Ninth Circuit's notice requirements could have a potentially devastating impact on the insurance industry, since insurers have for years sent out notices that could be construed to fall short of the Ninth Circuit's newly-minted requirements. Combined with the broad standard of "willfulness" adopted by the court (discussed further below), the Ninth Circuit's notice requirements could subject many insurers to statutory liabilities of staggering proportions.

According to industry data, it is estimated that, in 2005, the number of personal lines policies subject to credit scoring (including both new business and renewals) exceeded 71.5 million.[6] While there are no data stating how many adverse action

---

6. This figure was derived using public information, beginning with the latest personal auto and homeowners exposure counts from the National Association of Insurance Commissioners for those states where credit information is allowed. Because each insured automobile constitutes an "exposure," even though more than one auto may be insured on a single policy, the total number of "exposures" was extrapolated and converted into policy counts using data from the Federal Highway Administration and the U.S. Census Bureau. The total policy counts (176.4 million) were then reduced to include only those policies for which credit history was examined. The factors used to generate the final numbers and their sources are as follows:

> Proportion of companies known to use insurance scoring - Michigan Office of Financial and Insurance Services;
>
> (Cont'd)

notices insurers sent during this same time period, it may conservatively be assumed that approximately 50% of these policies triggered such notices.[7] Based on these assumptions, insurers sent some 35.7 million adverse action notices in 2005 alone, *not* including those sent when an application was denied. Assuming that similar numbers of adverse action notices were sent in each of the past five years, carriers have sent approximately 178.5 million adverse action notices since 2001 – many of which could conceivably be vulnerable to *ex post facto* scrutiny based on the Ninth Circuit's newly imposed notice requirements.

(Cont'd)

- Percentage of the largest auto companies using credit scoring models - Conning & Company;
- Percentage of companies using credit data on new business - Conning & Company;
- Retention ratios (applied to develop breakdown between new business and policy renewals) - Ward Financial Group; and
- Frequency with which renewal policy counts are subject to credit (three years) - National Conference of Insurance Legislators' Model Act Regarding Use of Credit Information in Personal Insurance

These percentages and ratios were then applied to the total policy counts to determine the estimated new and renewal policies affected by the use of credit-based insurance scoring.

7. These percentages obscure the fact that, generally speaking, the use of credit information and other consumer reports enables carriers to charge *lower* rates overall than would otherwise be the case. Thus, a carrier's actions in an individual case might trigger an adverse action notice (e.g., where the applicant's credit standing results in an "increased" premium), even though the applicant is charged less than if the carrier had calculated the premium using a different set of factors that did not include credit information.

FCRA provides for statutory damages of between $100 and $1000 per willful violation. 15 U.S.C. § 1681n(a). The Ninth Circuit's overreaching interpretation of FCRA's notice requirements thus potentially exposes the insurance industry to statutory damages alone (not including punitive damages) that could threaten the solvency of many insurers and negatively affect the continued availability and affordability of personal lines insurance. Even without more, but especially in light of these potentially devastating consequences, the Ninth Circuit's erroneous and unsupported interpretation of FCRA's notice requirements should not be allowed to stand.

D. The Ninth Circuit's Conclusions on Notice and Willfulness Are Inconsistent with FCRA's Intent and Threaten to Subject the Insurance Industry to Potentially Crippling Penalties.

Violations of FCRA, including the failure to comply with the adverse action notice requirements of section 1681m(a), subject the users of consumer reports to a variety of civil damages and penalties. "Negligent noncompliance" subjects a user to liability for actual damages sustained by the consumer as a result of the noncompliance, plus court costs and attorney fees in the event of successful litigation. 15 U.S.C. § 1681o(a). If the noncompliance is "willful," the user is additionally liable for statutory damages of between $100 and $1,000 per consumer, and may be liable for punitive damages as well. *Id.* § 1681n(a).

As explained by petitioners, the Ninth Circuit's adoption of a "reckless disregard" standard of willfulness blurs the distinction between negligent and willful conduct and is therefore contrary to this Court's prior holdings.[8] Even were

8. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 129-30 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988), both of which hold that mere negligence does not equal willfulness.

that not so clearly the case, other circuits have concluded – correctly – that the level of culpability required to constitute "willfulness" under FCRA is much higher than mere recklessness, reserving its application to situations in which the defendant *knew* the challenged conduct to be unlawful. *See, e.g., Phillips v. Grendahl*, 312 F.3d 357, 368, 370 (8th Cir. 2002) (noting that "the statute's use of the word 'willfully' imports the requirement that the defendant *know* his or her conduct is unlawful" and that "willful noncompliance under section 1681n requires *knowing and intentional* commission of an act the defendant knows to violate the law" (emphasis added)); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) ("[I]n order to incur civil liability for operating under false pretenses, a party must act willfully and purposefully 'with a motivation to injure.' [Citation.] This interpretation comports with the language of § 1681n . . . ."). Indeed, the Ninth Circuit specifically acknowledged this authority but opted to follow the "reckless disregard" standard adopted by the Third Circuit in *Cushman v. Trans Union Corp.*, 115 F.3d 220, 229 (3d Cir. 1997).[9] *Reynolds*, 435 F.3d at 1098.

The Ninth Circuit's erroneous interpretation of the term "willfully" should be rejected. If the Ninth Circuit's "reckless disregard" standard were to be applied to all aspects of FCRA compliance, including the content of adverse action notices, major segments of the insurance industry could be subjected to potentially ruinous statutory and punitive damages resulting from the routine – and long-approved – use of consumer reports. The alternative is that insurers may be dissuaded from using consumer reports altogether, which would *increase* the cost of insurance to consumers.[10]

---

9. Although declining to adopt an "actual knowledge" standard, the *Cushman* court was at least careful to point out that, to be actionable as a "willful" violation, the defendant's conduct "must be on the same order as willful concealments or misrepresentations." *Cushman*, 115 F.3d at 227. The Ninth Circuit has not similarly qualified its holding.

10. *See* note 7 above.

These potential results are far removed from Congress's intent in enacting FCRA, which specifically authorizes the use of consumer reports in the underwriting of insurance. *See* 15 U.S.C. § 1681b. At the same time, the effect of the Ninth Circuit's notice requirements is to seriously disrupt the ability of insurers to do business and, in the final analysis, to harm the very consumers that FCRA was enacted to protect.

CONCLUSION

For all the reasons discussed above and in the briefs submitted by petitioners, this Court should reverse the judgments below and remand for reinstatement of the judgments in favor of petitioners.

Respectfully submitted,

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APPENDIX

APPENDIX A – "FTC FACTS FOR BUSINESS: CONSUMER REPORTS – WHAT INSURERS NEED TO KNOW" (FTC OCTOBER 1998)

FTC FACTS for Business

As an insurer, you may use consumer reports to underwrite insurance policies and to screen high-risk applicants — as long as you comply with the Fair Credit Reporting Act (FCRA).

The Act

The FCRA is designed to protect the privacy of consumer report information and to guarantee that the information supplied by credit reporting agencies (CRAs) is as accurate as possible. Consumer reports may include information on an applicant's credit history, medical conditions, driving record, criminal activity, and hazardous sports. Amendments to the FCRA, which went into effect September 30, 1997, increase the legal obligations of insurers who use consumer reports.

The Adverse Action Notice

The following disclosure requirement applies to new applicants as well as current policy holders. When an adverse action is taken—such as a decision to deny insurance, increase rates, or terminate a policy—and it is based solely or partly on information in a consumer report, Section 615(a) of the FCRA requires you to provide a notice of the adverse action to the consumer. The notice must include:

- ✓ the name, address, and telephone number of the CRA that supplied the consumer report, including the toll-free telephone number for credit bureaus that maintain files nationwide;
- ✓ a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give the specific reasons for it; and
- ✓ a notice of the individual's right to dispute the accuracy or completeness of any information the CRA furnished, and the consumer's right to a free report from the CRA upon request within 60 days.

Disclosure of this information is important because some consumer reports may contain errors. The adverse action notice is required even if information in the consumer report was not the main reason for the denial or rate increase. Even if the information in the report played only a small part in the overall decision, the applicant still must be notified.

While written adverse action notices are not required, many insurers provide them and keep copies for two years to show compliance with the FCRA.

Examples

The following examples illustrate situations where the adverse action notice must be given to insurance applicants.

A life insurance company orders a consumer report from a CRA, such as the Medical Information Bureau (MIB). Information contained in the MIB report leads to further investigation of the applicant. The application for insurance is rated or declined in whole or in part because of information obtained from the investigation.

Section 604(g) of the FCRA requires an insurance company, or any other user of medical information, to get the consumer's consent — orally, electronically, or in writing — before obtaining medical information. That means the life insurance company in this situation would have to get the consumer's consent before obtaining the consumer report from the MIB. In addition, since the MIB report formed part of the basis for the adverse decision in this case, the full Section 615(a) adverse action notice described above must be sent to the consumer.

A person with an unfavorable credit history, such as a bankruptcy, is denied automobile insurance at standard rates. Although the credit history was considered in the decision, the applicant's limited driving experience was even more important

The applicant is entitled to the Section 615(a) adverse action notice because the credit report played a part, however minor, in the insurer's decision to charge a higher premium.

BEST AVAILABLE COPY

Non-compliance with the FCRA

There are legal consequences for insurers who fail to get an applicant's permission before requesting a consumer report or who fail to provide required disclosure notices. The FCRA allows individuals to sue insurers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue insurers for non-compliance and obtain civil penalties.

For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft, and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman

APPENDIX B – FTC STAFF OPINION LETTER, DATED NOVEMBER 10, 1998

Federal Trade Commission (F.T.C.)
Division of Financial Practices

Fair Credit Reporting Act

Staff Opinion Letter

November 10, 1998

Mr. Ronald L. Sheffield

Special Assistant Commissioner, Consumer Affairs

Arkansas Insurance Department

1200 West Third Street

Little Rock, AR 72201-1904

Dear Mr. Sheffield:

This will respond to your letter inquiring about the applicability of the Fair Credit Reporting Act ('FCRA") to an insurance company's denial of insurance to an applicant based on information contained in a consumer report. You ask two specific questions: (1) does the FCRA require an insurance company to disclose to an applicant what specific information in the credit report was relied on in denying insurance to that applicant; (2) if not, would the insurance company violate the FCRA by voluntarily disclosing such information to the applicant. The answer is 'no" to both questions.

Section 615(a) of the FCRA sets forth the information that must be disclosed to a consumer by any person taking adverse action [FN1] with respect to that consumer based in whole or in part on any information contained in a consumer report. That section requires disclosure of only the information specified, namely:

1. Notice (either oral, written, or electronic) of the adverse action;

2. The name, address, and telephone number of the consumer reporting agency ('CRA") from whom the report was obtained. If the CRA compiles and maintains files on consumers on a nationwide basis, the person must disclose a toll-free number for the CRA, which the CRA is required to establish;

3. A statement that the CRA did not make the decision to take the adverse action and is unable to provide the specific reasons why the action was taken; and

4. Notice of the consumer's right to obtain a free copy of his or her consumer report from the CRA and to dispute the accuracy or completeness of any information in a consumer report furnished by the CRA.

The FCRA does not require insurers to disclose specific reason(s) for

1998 WL 34323720 (F.T.C.)

taking adverse action, or to identify information from a consumer report that contributed to the action. Instead, it provides the consumer with the right to obtain a copy of all the information in his or her CRA files. From the required notice (item #4, above), consumers who suffer adverse action will know of their right to obtain that data without charge. However, should an insurer or other person wish to tell a consumer the reason(s) for the adverse action, nothing in the FCRA precludes that person from doing so. [FN2]

This is an informal staff opinion and is not binding on the Commission.

Sincerely,

Ronald G. Isaac

Attorney

[FN1]. With respect to the underwriting of insurance, Section 603(k)(1)(B)(i) of the FCRA defines "adverse action" to mean "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

[FN2]. Section 607(c) forbids CRAs from prohibiting insurers or other consumer report users from providing consumers against whom they have taken adverse action with copies of their reports.

1998 WL 34323720 (F.T.C.)

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FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-84 & 06-100

In the

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, et al.,
Petitioners,

v.

CHARLES BURR, et al.,
Respondents.

GEICO GENERAL INSURANCE COMPANY, et al.,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR *AMICUS CURIAE* TRANS UNION LLC IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

With the consent of all parties[1] *amicus curiae*, Trans Union LLC ("Trans Union"), submits it brief in support of petitioners Safeco Insurance Company of America, *et al.* and GEICO General Insurance Company, *et al.* ("Petitioners").

Trans Union is a Delaware limited liability company with businesses that operate as a "consumer reporting agency," as that term is defined under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), and which is more commonly known as a credit bureau. Trans Union's consumer reporting database contains approximately 3.7 billion items of information, associated with approximately 200 million consumers throughout the United States. These items consist of "tradelines" from credit grantors ("tradeline" is an industry term for the current and historical activities of a particular consumer's account with a particular credit grantor), and public record items from public records sources. Each month, Trans Union receives over 2 billion updates/additions to the items in its database. These updates come from approximately 85,000 different sources (called "furnishers"), including banks, credit card companies, mortgage companies, collection agencies, and other financial institutions. *See, e.g., Benson v. Trans Union, LLC*, 387 F. Supp. 2d 834, 841 (N.D. Ill. 2005) (noting vast scale of information received and processed by Trans Union).

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[1] Letters from petitioners and respondents memorializing the consent to the filing of *amicus curiae* briefs by any entity have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief.

Trans Union, Equifax Information Services, LLC, and Experian Information Solutions, Inc.—the nation's three largest "consumer reporting agencies," or CRA's, as that term is defined in the FCRA, 15 U.S.C. § 1681a(f)—collectively issue more than 1 billion consumer reports to third parties each year, and issued 57.4 million file disclosures to consumers in 2003. FTC & Bd. of Governors of the Fed. Reserve Sys., *Rep. to Cong. on the Fair Credit Reporting Act Dispute Process*, at 2-3 (Aug. 2006) (citations omitted).[2]

Trans Union maintains files on residents of all 50 States, and employs procedures which apply across its national operations. Trans Union has approximately 4,000 employees.

Trans Union submits this brief in support of the Petitioners because the consumer credit reporting activities of Trans Union are extensively regulated by the FCRA. Moreover, because the FCRA is directed primarily at regulating CRA's, and not their clients (like the Petitioners here), the Ninth Circuit's erroneous ruling as to the standard for establishing a "willful" violation of the FCRA, 15 U.S.C. § 1681n, greatly impacts Trans Union. Finally, Trans Union respectfully submits that consideration of the unique statutory scheme which imposes duties on CRA's will further demonstrate the error of the Ninth Circuit's ruling on the issue.

The Petitioners collectively raise two issues. The arguably more narrow issue involves review of the Ninth Circuit's determination that certain uses, and the consequences of those uses, of consumer credit data by personal lines insurers constitute "adverse action," as that term is defined in the FCRA, thereby triggering the insurers' duty to provide adverse-action notices under 15

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[2] Available at <http://www.ftc.gov/os/comments/fcradispute/P044808fcradisputeprocessreporttocongress.pdf>.

U.S.C. § 1681m. The obligation on users of "consumer report" information to provide adverse-action notices is one of the few significant duties imposed on customers of CRA's. *See generally* 15 U.S.C. § 1681m ("Requirements on users of consumer reports"). Notably, by the 2003 amendments to the FCRA, Congress eliminated the private right of action to bring claims for violations of Section 1681m, such as the failure to provide adverse-action notices. *See* 15 U.S.C. § 1681m(h)(8)(A); *Perry v. First Nat'l Bank*, 459 F.3d 816, 823 (7th Cir. 2006).

The larger issue, and one which more directly impacts Trans Union and other CRA's, is the Ninth Circuit's ruling, in conflict with the holdings of other Circuits that have considered the issue, that a defendant can be found to have "willfully" violated the FCRA where it relies upon what is later viewed to be an "unreasonable" interpretation of the statute. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006). Given the impact on Trans Union if the Ninth Circuit's ruling were to be upheld, Trans Union respectfully submits this brief to offer a perspective on the statute that the parties likely will not offer.

As originally enacted, the regulatory focus of the FCRA was on CRA's like Trans Union. As part of its legislative findings, Congress noted that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(3). Congress further expressly stated that the purpose of the FCRA was "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce . . . in a manner which is fair and equitable to the consumer." 15 U.S.C. § 1681(b). Much more recent amendments to the FCRA have imposed certain duties on data furnishers and users of data reported by credit bureaus and other CRA's. Nonetheless, the statute

remains primarily focused on regulating the business operations of CRA's.

The FCRA also permits consumers to sue CRA's for the violation of "any requirement imposed under" the FCRA. 15 U.S.C. §§ 1681n(a), 1681o(a). Where a CRA has been "negligent in failing to comply with any requirement," the FCRA expressly provides for an award of "any actual damages sustained by the consumer as a result of the failure," as well as an award of attorneys' fees. § 1681o(a). Where a CRA is found to have "willfully" violated "any" of its statutory duties, it is liable for "actual damages" or, alternatively, "damages of not less than $100 and not more $1,000," and punitive damages, as well as attorneys' fees. § 1681n(a). These remedial provisions, which arguably guarantee a minimum recovery of up to $1,000 for "any" willful violation of the FCRA and attorneys' fees, have encouraged plaintiffs, and their lawyers, to bring claims for willful violations of the FCRA on behalf of putative classes. *See* David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006) (noting "proliferation of class action lawsuits" brought under FCRA in recent years).[3]

The possible "crushing liability" engendered by this remedial statutory scheme was noted by Justice Kennedy (and joined by Justice O'Connor) in their dissent to this Court's denial of certiorari in *Trans Union LLC v. FTC*, 536 U.S. 915, 917 (2002). There, Justice Kennedy questioned the District of Columbia Circuit's rejection of the First Amendment challenge to the Federal Trade Commission ("FTC") decision that Trans Union's target marketing lists constituted "consumer reports" subject to the full panoply of duties imposed by the FCRA. *Id.* at

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[3] The statute does not expressly provide for class action prosecution of FCRA violations, and therefore does not contain a cap on class action liability.

916. Justice Kennedy's opinion also underscores the problems associated with implementing the provisions of the FCRA when he noted that the FTC's interpretation of the statute at issue was "nonsensical." *Id.* at 917. Justice Kennedy also noted the "important practical implications" of the FTC ruling, in light of the "series of class actions" purportedly brought on behalf of 190 million individuals: "Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion . . . The company's demise will have adverse effects on both the national economy and petitioner's thousands of employees." *Id.*

SUMMARY OF ARGUMENT

This Court should reverse the court of appeals' decision which blurs the differing "state of mind" requirements in the civil liability provisions of the FCRA, and which ignores the statutory scheme as a whole. Although the particular claims at issue here involve the obligations of users of FCRA information to advise consumers of "adverse action," the FCRA primarily regulates "consumer reporting agencies" like Trans Union. Therefore, as this Court has previously noted, comprehensive regulatory statutes like the FCRA must be interpreted in harmony with the overall regulatory scheme, and its focus on CRA's.

The FCRA requires credit bureaus like Trans Union to implement balanced procedures which, on the one hand, will facilitate consumer credit and other transactions for which CRA's have a "vital role" while, on the other hand, being "fair and equitable" to the consumer. Given the volume, and the computerized and electronic nature, of those transactions, the procedures employed by CRA's are necessarily implemented by computerized algorithms and other complex business processes. Further complicating the challenge of devising

uniform, nationwide procedures which comply with the numerous mandates of the FCRA is the inherent vagueness of much of the statutory language. Both the FTC, by its informal efforts to provide guidance (despite its lack of rulemaking authority), and Congress, by its express statements and its efforts to clarify the statute by later amendments, have noted the inherent (and perhaps unavoidable) vagueness of the FCRA.

Consistent with these practical realities which CRA's face and the legislative directive to balance the needs of commerce with consumer protection goals, the statute does not impose strict liability on CRA's for any particular transaction which results in an error or the mis-delivery of a consumer report. Only when a CRA is put on notice of a reported inaccuracy that is not later remedied is it subject to liability for a negligent violation of the FCRA under 15 U.S.C. § 1681o. Similarly, only when a CRA has received information inconsistent with the statutory "reason to believe" that a credit bureau customer has a permissible purpose to receive "consumer report" information is the CRA subject to liability under Section 1681o.

Therefore, the Ninth Circuit's ruling that defendants can be subject to statutory damages of $100 to $1,000 and punitive damages for procedures resulting from an "unreasonable" interpretation of the statute, *Reynolds*, 435 F.3d at 1099, is inconsistent with the statutory scheme as a whole. This Court should adopt the rulings of other appellate courts which have considered the issue, and which have held that liability for willful violations under Section 1681n. is appropriate only where the defendant knowingly violated the FCRA.

ARGUMENT

I. The Credit Bureau Industry Faces the Challenge of Establishing Uniform Nationwide Procedures which Comply with Numerous and Often Vague Duties Imposed on Consumer Reporting Agencies under the FCRA.

A. The FCRA requires CRA's to implement procedures which balance the competing statutory goals.

The FCRA is directed primarily at CRA's—not entities like the Petitioner insurance companies, which are users of consumer reports—and imposes both general and specific duties on CRA's to create and implement reasonable procedures. Indeed, as part of the "Congressional findings and statement of purpose," Congress expressly stated that the purpose of the FCRA was to require CRA's to adopt reasonable procedures which balance the needs of commerce with the rights of consumers:

> It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

15 U.S.C. § 1681(b).

Consistent with 15 U.S.C. § 1681(b), the FCRA contains general directives to CRA's to implement "procedures" which will serve the general statutory goals enumerated by the FCRA. A primary goal of the FCRA is to maximize the accuracy of the information reported by CRA's to its customers. *See* 15 U.S.C. § 1681(b). The FCRA imposes a general duty on CRA's to "follow reasonable procedures to assure maximum possible accuracy" of the information delivered in "consumer reports" subject to the FCRA. § 1681e(b). To serve the goals of "confidentiality" and "proper utilization" of information furnished by CRA's—in other words, privacy—the statute similarly requires CRA's maintain "reasonable procedures" designed "to limit the furnishing of consumer reports" to the permissible purposes listed in the FCRA. 15 U.S.C. § 1681e(a), *citing* § 1681b.

The Congressionally-required balancing of the needs of commerce with the rights of consumers means that CRA's must establish procedures that will efficiently facilitate transactions in which accurate and relevant consumer information is delivered only to entities which will use that information to establish a consumer's eligibility for credit, insurance, or employment. *See, e.g., Washington v. CSC Credit Servs.*, 199 F.3d 263, 266-67 (5th Cir. 2000) (reasonable procedures must balance needs of commerce with interests of consumers); *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972-73 (7th Cir. 2004) (more extensive procedures to verify the accuracy of information from reliable sources would result in increased cost to consumers), *citing Henson v. CSC Credit Servs.*, 29 F.3d 280, 285 (7th Cir. 1994). The FCRA, however, provides no guidance on how to properly balance these important interests in creating "reasonable procedures." 15 U.S.C. § 1681e(b).

Even when the FCRA provides some detail about the procedures that CRA's must employ, it leaves the

ultimate decision-making based on those procedures to the judgment of the CRA's. For example, the FCRA requires that CRA's conduct a "reasonable reinvestigation" of any information disputed by a consumer. 15 U.S.C. § 1681i(a)(1)(A). The FCRA provides some details about the required reinvestigation: a CRA must complete the reinvestigation within 30 days, § 1681i(a)(1)(A); it must convey the dispute to the furnisher of the disputed information within five days of receiving the dispute, § 1681i(a)(2)(A); it must either delete or modify any "inaccurate or incomplete" information based on the furnisher's response and any information submitted by the consumer, § 1681i(a)(5)(A); and it must notify the consumer of the results of the reinvestigation within five days of the completion of the reinvestigation, § 1681i(a)(6)(A).

Despite these details, however, the FCRA requires a CRA to use its judgment and discretion when reinvestigating disputed information. The FCRA ultimately places the duty to compare the separate information received from the consumer and the data furnisher and determine the accuracy of the information "squarely on" the CRA. *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993) ("In a reinvestigation of the accuracy of credit reports, a credit bureau must bear some responsibility for evaluating the accuracy of information obtained from subscribers."). As a first step, the CRA must determine what information the consumer is disputing. It must then decide what constitutes "all relevant information" that it must send to the source of the information, 15 U.S.C. § 1681i(a)(2)(A); evaluate whether the dispute is "Frivolous or Irrelevant," § 1681i(a)(3); and "review and consider all relevant information submitted by the consumer," § 1681i(a)(4). While the furnisher is required to provide information to the CRA as part of the reinvestigation, the CRA cannot simply rely on the information received from the furnisher

in response to the dispute, and may even be required to conduct an independent investigation. *See Henson*, 29 F.3d at 286-87 (to determine whether it has duty to go beyond the information provided by the furnisher, CRA must balance cost of verifying furnisher's information with possible harm to the consumer); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 225 (3rd Cir. 1997) (CRA cannot fulfill reinvestigation duties by "merely parroting information received from other sources"). Ultimately, the CRA must reconcile often conflicting information from consumers and data furnishers and determine the "appropriate" modification for any information that the CRA determines is inaccurate or incomplete. 15 U.S.C. § 1681i(a)(5)(A).

B. The "procedures" mandated by the FCRA are computerized algorithms and other business processes which must facilitate millions of real-time transactions.

Given the volume of information handled by CRA's, as well as certain specific mandates of the FCRA, the procedures implemented by CRA's must be automated.[4] Accordingly, CRA's, like Trans Union, have established computerized algorithms, business processes, and other procedures which must, in essence, apply Trans Union's interpretations of the FCRA to the delivery of hundreds of millions "consumer reports" each year.

For example, to comply with the mandate of 15 U.S.C. § 1681e(b) to ensure the accuracy of consumer reports, Trans Union's "procedures include collecting and storing individuals' names, addresses, social security

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[4] Automation serves the interests of commerce by providing affordable access to accurate, timely consumer credit information, which allows credit grantors to make better decisions.

numbers and birthdates, and then linking that information to individual 'trade lines of credit,' which are in turn compiled to generate credit reports." *Benson*, 387 F. Supp. 2d at 841. Only an automated process could perform these database-building activities with 2 billion/updates additions received from 85,000 data furnishers each month. *See id.*

To serve the statutory goal of only providing consumer reports for permissible purposes, and to provide the proper consumer's report, Trans Union designed and employs sophisticated computerized algorithms which match inquiry information from potential creditors to the consumer information in Trans Union's database. The match logic of these algorithms compares, on a real-time basis, the identifying information submitted by a potential creditor (*i.e.*, name, address, social security number, date of birth) and identifies the existing consumer credit files with similar identifying information to determine what electronic data relates to the consumer applying for credit. *See Andrews v. Trans Union Corp.*, 7 F. Supp. 2d 1056, 1062 (C.D. Cal. 1998) (describing Trans Union's proprietary procedures for selecting consumer files), *rev'd on other grounds*, 532 U.S. 902 (2001), *and aff'd in part, rev'd in part*, 289 F.3d 600 (9th Cir. 2001); *see also Crabill v Trans Union, L.L.C.*, 259 F.3d 662, 663-64 (7th Cir. 2001) (describing Trans Union's computer programs which select the correct consumer's information).

Indeed, the FCRA mandates automated procedures. The FCRA requires nationwide CRA's, like Trans Union, to provide an automated system to allow furnishers of consumer credit information to report the results of dispute investigations. 15 U.S.C. § 1681i(a)(5)(D). More than 83% of consumer disputes are currently processed electronically, and all disputes will be processed electronically in the future. FTC & Bd. of

Governors of the Fed. Reserve Sys., *Rep. to Cong. on the Fair Credit Reporting Act Dispute Process*, at 15-16 (citations omitted). The FCRA also mandates that "Nationwide Consumer Reporting Agencies" establish an automated "centralized source" to provide consumers with their free annual credit reports. 15 U.S.C. § 1681j(a).

C. The duties imposed on CRA's are vague.

The language of the FCRA which governs the conduct of CRA's is inherently vague. This fact further complicates the efforts of CRA's to establish uniform nationwide procedures which comply with the statute.

The Congress that passed the FCRA recognized the statute's essential vagueness. *See* 116 Cong. Rec. 36574-76 (Oct. 13, 1970). One congressman, who supported the bill, admitted that "there is considerable confusion about how this bill will be interpreted. The definitions are so vague that no one is certain what is included as a consumer credit report.'" *Id.* at 36576 (remarks of Rep. Brown). Another lamented that "[i]t really is unfortunate that we must legislate in such a manner that leaves so many questions unanswered." *Id.* at 36575 (remarks of Rep. Wylie).

The uncertainty surrounding the meaning of the FCRA is illustrated by the varying interpretations given to the single most fundamental provision of the FCRA: 15 U.S.C. § 1681a(d). This provision defines the term "consumer report," which is the statutory term for the information subject to the FCRA. Knowing what is and is not a "consumer report" is the cornerstone of CRA's efforts to comply with the statute as there is no liability under the FCRA for disclosing information that is not a statutory "consumer report." Conversely, information that is a "consumer report" is subject to the full panoply of duties and rights created by the statute.

The FCRA defines a "consumer report," in part, as:

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expect to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for –
>
> (a) credit or insurance to be used primarily for personal, family, or household purposes;
>
> (b) employment purposes; or
>
> (c) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d)(1).[5]

As the Seventh Circuit has noted, by referencing the purposes for which a "consumer report" can be disclosed under 15 U.S.C. § 1681b, this definition of "consumer report" is circular. *Ippolito v. WNS, Inc.*, 864 F.2d 440, 449 n.10 (7th Cir. 1988). In addition, the FCRA

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[5] The partial quotation from the statutory definition does not include the exclusions from the definition, many of which are counterintuitive. For example, under § 1681a(d)(2)(A)(iii), information that is a "consumer report" ceases to be a consumer report if it is communicated among corporate affiliates and the consumer has been given notice and the opportunity to prevent the communication. 15 U.S.C. § 1681a(d)(2)(A)(iii).

limits the definition of "consumer report" to only communication of information by a "consumer reporting agency," 15 U.S.C. § 1681a(d), but then defines "consumer reporting agency" as an entity that collects information "for the purpose of furnishing consumer reports," § 1681a(f).

Not surprisingly, courts have struggled to interpret the term "consumer report." Some courts found that information was not a "consumer report" unless the end-user of the information used it for a purpose specified by the FCRA, such as granting credit. *See Hovater v. Equifax, Inc.*, 823 F.2d 413, 417 (11th Cir. 1987); *Houghton v. New Jersey Manu. Ins. Co.*, 795 F.2d 1144, 1148 (3d Cir. 1986); *Cochran v Metropolitan Life Ins. Co.*, 472 F. Supp. 827, 831 (N.D. Ga. 1979); *Henry v. Forbes*, 433 F. Supp. 5, 9-10 (D. Minn. 1976). Other courts reached a different conclusion, finding that, regardless of the purpose for which the information was used, a "consumer report" existed if information was collected by the consumer reporting agency for a purpose specified by the FCRA. *St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 885 (5th Cir. 1989); *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696 (10th Cir. 1980); *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978); *Boothe v. TRW Credit Data*, 523 F.Supp. 631, 634 (S.D. N.Y. 1981).

Indeed, one aspect of the decision below provides further evidence of the uncertainty of the term "consumer report." The statutory definition includes "any written, oral, or other communication" of information bearing on one of seven characteristics. 15 U.S.C. § 1681a(d); *Trans Union Corp. v. FTC*, 81 F.3d 228, 231 (D.C. Cir. 1996) (definition of "consumer report" in FCRA contains "seven enumerated factors"). According to the Ninth Circuit, this definition is so broad that it "unquestionably" includes a CRA's disclosure that is does *not* have any such

information about the consumer. *Reynolds*, 435 F.3d at 1093-94. In other words, according to the Ninth Circuit, a consumer report includes not only consumer creditworthiness information that a CRA has, *but also* information it does not have.

Just as Congress first acknowledged the ambiguity of the FCRA when it first enacted the statute (*see supra* p. 12), a quarter-century later Congress again conceded the original statutory vagueness. When it amended the FCRA in 1996, Congress recognized that certain amendments were necessary to address problems caused by confusion over existing provisions and technological advancements in the credit reporting industry:

> A number of problems in the FCRA's implementation and interpretation have arisen in the years since the law's enactment. Many of these problems are a result of *ambiguities in the statute*; other problems have arisen as the credit reporting industry has grown in the wake of *information technology advances* that have occurred over the last twenty years.

Report of the Committee on Banking, Housing and Urban Affairs, S. Rep. No. 104-185, at 18 (1995) (emphasis added).

To clarify the ambiguities in the FCRA, Congress in 1996 made several specific changes. For example, the originally-enacted FCRA was unclear on which date CRA's should use to calculate when derogatory credit information became obsolete. To ensure the timely removal of such information, Congress specified a standard "date of delinquency" used to calculate when information became obsolete. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, §2406(a)(b), 110 Stat. 3009-434 (1996), *codified at* 15 U.S.C. §

1681c(c)(1). The FCRA also originally provided that CRA's must disclose to a consumer the "nature and substance" of the information in their file for that consumer. *See* S. Rep. No. 104-185, at 41. Congress changed this provision to require disclosure of "all information" in a consumer's file to ensure that consumers received actual copies of their reports, which is consistent with the FTC's view that a consumer's "file" only encompasses information that a CRA provides to a third party in a consumer report. Pub. L. 104-208, §2408(a), 110 Stat. 3009-436, *codified at* 15 U.S.C. § 1681g(a)(1); 16 C.F.R. Pt. 600, App., § 603(g), No. 2. As part of the 1996 amendments Congress also codified (with some variance) the FTC interpretation of the FCRA which permitted CRA's to access credit report data to provide "prescreened" lists for the purpose of making unsolicited credit and other offers. *See* S. Rep. No. 104-185, at 36; 16 C.F.R. Pt. 600, App., §604(3)(A), No. 6. The 1996 amendments specifically identified "credit or insurance transactions that are not initiated by the consumer" as a permissible purpose. Pub. L. 104-208, §2404(a), 110 Stat. 3009-431–33, *codified at* 15 U.S.C. § 1681b(c).

D. There is little regulatory guidance regarding the FCRA duties imposed on CRA's.

Unlike many consumer protection statutes, or other statutes creating detailed regulatory schemes, there is little formal guidance available about the FCRA and no Federal agency has comprehensive rulemaking authority regarding the duties of CRA's. As originally enacted in 1970, although it did provide the FTC with enforcement authority, 15 U.S.C. § 1681s(a)(1), the FCRA did not provide the FTC with rulemaking authority. By the 1996 amendments, Congress made it clear that the FTC had no authority to issue regulations related to the FCRA. *See*

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, §2416(a)(2), 110 Stat. 3009-450 (1996).

While this provision was later removed, the FCRA currently authorizes the FTC to issue regulations only as to specific topics. *See, e.g.*, 15 U.S.C. § 1681a(q)(3) (authority to define "identity theft"); 15 U.S.C. § 1681m(d)(2)(B) (authority to dictate format, type size, and manner of presentation of address and telephone numbers on firm offers of credit); 15 U.S.C. § 1681m(e) (authority to issue regulations regarding identity theft). Much of this authority was added by the 2003 amendments to implement new provisions, many of which do not relate to CRA's or their pre-existing duties under the FCRA. *See, e.g.*, Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108-159, §115(2), 117 Stat. 1990 (2003), *codified at* 15 U.S.C. § 1681m(e) (authority to issue regulations regarding identity theft); Pub. L. 108-159, §211(d), 117 Stat. 1972 (authority to issue regulations implementing the requirement to provide consumers with free annual consumer reports).

Shortly after the enactment of the FCRA in 1970, the FTC recognized the need to interpret the vague terms of the FCRA to help CRA's and other regulated entities comply with their legal obligations. Therefore, pursuant to its enforcement authority, the FTC issued "Statements of General Policy or Interpretation" in 1973. 16 C.F.R. Pt. 600; 88 F.R. 4945 (Feb. 23, 1973). The FTC amended and supplemented its interpretations over time, ultimately issuing in 1990 its "Commentary on the Fair Credit Reporting Act." 16 C.F.R. Pt. 600, App.; 55 F.R. 18808 (May 4, 1990). The FTC issued this nonbinding Commentary to "serve as guidance to consumer reporting agencies, their customers and consumer representatives." 16 C.F.R. §§ 600.1(b), 600.2(a). This Commentary, however, has not been updated since 1990, and it does not reflect the significant amendments to the FCRA in 1996

and 2003. Separately, while the FTC formerly issued nonbinding staff opinion letters answering questions about the application of the FCRA to particular fact scenarios, it has not done so since 2001.[6]

Therefore, there is no rulemaking or other administrative guidance which can mitigate the vagueness of many of the duties imposed by the FCRA.

II. The Statutory Framework of the FCRA Evidences an Intent to Subject a CRA to Statutory and Punitive Damages Only When the CRA Knows That its Conduct Violates the FCRA.

CRA's like Trans Union facilitate more than 1 billion transactions each year between individual consumers and credit grantors, insurers, and other entities with whom they seek to do business. It is well-established that this widespread availability of real-time consumer credit information provides significant benefits to United States consumers by allowing them easier access to less expensive credit.[7] Congress expressly found,

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[6] The FTC issued staff opinion letters until 2001, but has stated that "Except in unusual circumstances, the staff will no longer issue written interpretations of the FCRA." *See* <http://www/ftc/gov/os/statutes/fcrajump.htm> (providing access to copies of Staff Opinion Letters issued from 1997 through 2001).

[7] *See, e.g.*, Walter F. Kitchenman, *U.S. Credit Reporting: Perceived Benefits Outweigh Privacy Concerns*, The Tower Group, at 5 (Jan. 1999) (available at <http://www.privacyalliance.org/resources/kitcenman.pdf>). For example, United States consumers pay lower mortgage rates than consumers in Europe, yielding an estimated savings of $120 billion each year. *Id.* at 7; Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at 7 (available at <http://www.ftc.gov/bcp/workshops/infoflows/statements/cate02.pdf>); Fred H. Cate and

in enacting the FCRA, that CRA's perform a "vital" role in the U.S. economy. 15 U.S.C. § 1681(a)(3). Based on this vital role, and due to the enormous volume of data which is assembled and furnished by CRA's in consumer credit transactions, the FCRA does not make CRA's strictly liable for procedures which result in errors in consumer reports or in providing consumer reports to users who do not have a permissible purpose.

Even though the statute is designed to protect against such occurrences, the statutory scheme as a whole makes clear that only when a CRA has knowledge of facts which suggest, for example, an inaccuracy or lack of permissible purpose, is the CRA subject to a claim for a *negligent* violation of the FCRA. The standard necessary to establish a *willful* violation, and to subject defendants to statutory and punitive damages under 15 U.S.C. § 1681n(a) is, accordingly, significantly higher. Therefore, the Ninth Circuit's ruling that a willful violation of the FCRA can occur if a defendant interprets the FCRA in a way that is "unreasonable" or "creative," *Reynolds*, 435 F.3d at 1099, is inconsistent with the statutory framework, which as other Circuits have realized, requires knowledge that particular conduct is violative of the FCRA to establish a willful violation of the FCRA.[8]

Richard J. Varn, *The Public Record: Information Privacy and Access-A New Framework for Finding the Balance*, at 11 (1999).

[8] Other provisions of the FCRA use the term "knowing." Looking at the statute as a whole, however, it is clear that Congress has not carefully used the term "knowing" to have a precise, separate meaning different from "willful." The FCRA includes numerous "state of mind" words in the statute—malice, 15 U.S.C. § 1681h(e), knowingly, §§ 1681n(a)(1)(B), 1681n(b) willfully, §§ 1681n(a), 1681q, 1681r, pattern and practice, § 1681s(a)(2)(A), false pretenses, §§ 1681n(a)(1)(B), 1681n(b)—thereby suggesting that the use of one term rather than another has no particular significance. The overlap between the precise meaning of these terms is further

A. The FCRA is a comprehensive statutory scheme for regulating CRA's, and its civil liability provisions should be interpreted in a manner consistent with the statutory framework.

The level of knowledge and intent required to establish a willful violation of the FCRA under 15 U.S.C. § 1681n should not be viewed in isolation, or even in the context of an insurer's failure to provide adverse-action notices. Instead, because the FCRA represents a comprehensive scheme for regulating CRA's, the standard for establishing *negligent* violations of duties imposed on CRA's (under § 1681o) is relevant to determining the knowledge requirement for *willful* violations under § 1681n.

Federal courts have long recognized that the FCRA is a "comprehensive series of restrictions on the disclosure and use of credit information assembled by [CRA's]," as well as an "elaborate scheme for administrative enforcement of the FCRA." *FTC v. Manager Retail Credit Co.*, 515 F.2d 988, 989-90 (D.C. Cir. 1975); *see also Islam v. Option Mortgage Corp.*, 432 F.Supp.2d 181, 185 (D. Mass. 2006) (noting the FCRA's "elaborate regulatory structure"). Trans Union, like other CRA's, is "comprehensively regulated by the provisions of the FCRA." *FTC v. TRW, Inc.*, 628 F.2d 207, 208-09 (D.C. Cir. 1980).

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demonstrated by Congress' grouping of these terms together. *See, e.g.*, §§ 1681h(e) ("malice or willful intent"); §§ 1681n(a)(1)(B), 1681n(b) ("under false pretenses or knowingly"); §§ 1681q, 1681r ("knowingly and willfully"); § 1681s(a)(2)(A) ("knowing violation, which constitutes a pattern or practice"). In sum, it is fair to say that the FCRA does not use the terms "willful" and "knowing" in a way that would suggest an intended clear hierarchal "state of mind" requirement.

When examining another consumer-protection statute enforced by the FTC, this Court recognized that "strict construction" was not appropriate because "[w]e deal with remedial legislation of a regulatory nature where our task is to fit, if possible, all parts into an harmonious whole." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959) (Fur Products Labeling Act). Therefore, this Court read the disputed definition "hospitably-with [the purpose of the act] in view." *Id.* This statutory construction principle is consistent with this Court's other decisions interpreting regulatory statutes. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

> The meaning or ambiguity of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole."

Id. at 132-33 (citations omitted). The Ninth Circuit failed to perform this statutory construction exercise, and essentially adopted a definition of "willful" under Section 1681n that merges the necessary distinction between "negligent" violations, which entitle consumers to "actual damages" and attorneys' fees, and "willful" violations, which subject CRA's to liability, including potential class action liability, for statutory damages of up to $1,000 per person, as well as punitive damages.

B. CRA's must have notice of a problem before liability under 15 U.S.C. § 1681o is established.

The FCRA does not impose strict liability on CRA's for conduct which results in inaccurate or mis-reporting of data, or other violations of the FCRA, and instead requires a showing of knowledge of a specific problem before liability under 15 U.S.C. § 1681o for a negligent violation is established.

The FCRA does not make CRA's strictly liable for reporting information that is found to be inaccurate. Instead, a CRA's duty is to maintain "reasonable procedures" to assure the accuracy of the information reported. 15 U.S.C. § 1681e(b); *see also Henson*, 29 F.3d at 284; *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991); *Crabill*, 259 F.3d at 663-64. Absent specific notice of an error in information that it receives, a CRA's duty to maintain reasonable procedures generally does not obligate it to investigate or verify the accuracy of the data reported to it. *Henson*, 29 F.3d 285-86. 15 U.S.C. § 1681e(b) "does not hold a [CRA] responsible where an item of information, received from a source that it reasonably believes is reputable turns out to be inaccurate, unless the [CRA] receives notice of systemic problems with its procedures." *Sarver*, 390 F.3d at 972, *citing* the FTC's 1990 Commentary, 16 C.F.R. Pt. 600, App., §607, No. 3.A. This rule makes practical sense. As the Seventh Circuit has observed:

> One can easily see how, even with safeguards in place, mistakes can happen. But given the complexity of the system and the volume of information involved, a mistake does not render the procedures unreasonable. . . In the absence of notice of prevalent unreliable information from a reporting lender, which would put [the

> CRA] on notice that problems exist, we cannot find that such a requirement to investigate would be reasonable given the enormous volume of information [the CRA] processes daily.

Sarver, 390 F.3d at 972.

Nor are CRA's strictly liable for disclosing consumer reports when the end user does not have a "permissible purpose" to obtain them. Instead, CRA's have only a duty to maintain "reasonable procedures to limit the furnishing of consumer reports" to the permissible purposes listed in 15 U.S.C. § 1681b. *See* 15 U.S.C. § 1681e(a). Consistent with that standard, the FCRA also provides that a CRA may furnish consumer reports to persons which the CRA "has reason to believe" intend to use the consumer reports for a permissible purpose. Moreover, if the CRA follows the basic procedures to obtain a user's certification of permissible purpose,[9] the CRA then has the statutory "reasonable grounds for believing" that the disclosure of a consumer report is for a permissible purpose under the FCRA. § 1681e(a). Unless the CRA actually knows that the consumer report is sought for an improper purpose, a CRA will not be liable for violations of the FCRA. *Boothe*, 557 F.Supp. at 71.

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[9] The FCRA requires that the prospective users identify themselves, certify the purpose for which the information is sought, and to certify that the consumer reports will not be used for another purpose. 15 U.S.C. §1681e(a). The CRA also is required to make a reasonable effort to verify the identity of new users and the uses for the information identified by them. §1681e(a).

C. The knowledge requirement for "negligent" FCRA liability mandates a standard for "willful" liability requiring proof of the defendant's knowledge of the violation of law.

The FCRA imposes differing civil liability on credit bureaus for violation of "any requirement" imposed by the federal statute, depending on the relative "state of mind" of the defendant. A negligent failure to comply with any of the numerous duties imposed upon credit bureaus entitles a consumer to "actual damages" and attorneys fees. 15 U.S.C. § 1681o(a). Nonetheless, as described above, the specific provisions of the FCRA which impose duties on credit bureaus do not create liability absent prior notice to the CRA of some problem with its procedures. Therefore, the express terms of the statute, *e.g.*, 15 U.S.C. §§ 1681e(a), 1681b(a)(3), and federal appellate court decisions interpreting these provisions, recognize a higher standard for negligent violation of the law as compared to traditional standards of common-law negligence.

Consistent with this statutory scheme, therefore, the ruling of the Ninth Circuit that conduct based upon an interpretation of the FCRA that is later deemed to be "unreasonable," *Reynolds*, 435 F.3d at 1099, is not consistent with the statutory scheme. As the majority of the Circuits which have examined the issue have ruled, a willful violation of the FCRA can only occur when the defendant knowingly violated its statutory obligations.

CONCLUSION

Indeed, if left undisturbed, the Ninth Circuit's standard could impose statutory and punitive damage liability for conduct that should not even give rise to negligent liability. Therefore, for the foregoing reasons, *amicus curiae* Trans Union LLC respectfully requests that this Court reverse the decision of the Court of Appeals and hold that a willful violation of the FCRA can only be established by a showing that the defendant knowingly violated the statute.

November 13, 2006

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FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-84, 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE CO. OF AMERICA, *et al.*,
Petitioners,

v.

CHARLES BURR, *et al.*,
Respondents.

GEICO GENERAL INSURANCE CO., *et al.*,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae addresses the following question only:

Whether the Ninth Circuit improperly expanded § 1681m of the Fair Credit Reporting Act by holding that an "adverse action" has occurred and notice is required thereunder, even when a consumer's credit information has had either no impact or a favorable impact on the rates and terms of the insurance that would otherwise have been offered or provided?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government.

In particular, WLF has regularly appeared in this and other federal courts to oppose unwarranted civil damage actions against those involved in the dissemination and use of consumer information. *See, e.g., Trans Union LLC v. Federal Trade Comm'n*, 245 F.3d 809 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 915 (2002). WLF also has published articles addressing some of the Fair Credit Reporting Act questions presented in this matter. *See, e.g.*, Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable*, WLF LEGAL BACKGROUNDER, Jan. 27, 2006, available at www.wlf.org/upload/012706LBDetlefsen.pdf.

WLF believes that the free and efficient flow of consumer information is vital to the health of the American economy. WLF is concerned that the Ninth Circuit's decision, if allowed to stand, will interfere significantly with that flow by increasing the costs of obtaining such information and by creating considerable uncertainty among users of such information regarding their obligations under the Fair Credit

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

Reporting Act (FCRA). WLF believes that as a result of the Ninth Circuit decision, consumers will be sent information that they neither want nor need, and the price of insurance will rise while its availability deceases.

WLF is filing this brief with the consent of all parties. Copies of the consent letters have been lodged with the Court.

STATEMENT OF THE CASE

Under the FCRA, a user of consumer reports must notify a consumer if the user "takes any adverse action with respect to [the] consumer that is based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a)(1). The FCRA defines an "adverse action" as, *inter alia*, "an increase in any charge for . . . any insurance." 15 U.S.C. § 1681a(k)(B)(i).

It is uncontested that Petitioner GEICO General Insurance Co. and related corporations (collectively, "GEICO") are "users of consumer reports."[2] Like virtually all insurance companies, GEICO uses credit information gleaned from consumer reports in pricing many of its products; it finds that doing so permits it to predict with a greater degree of accuracy the extent to which an insured is likely to make claims on his or her policy. It is also uncontested that when Respondent Ajene Edo applied for automobile insurance, GEICO considered Edo's credit score in the course of pricing his policy. The issue presented is whether GEICO should be

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[2] Because WLF is focusing on an issue raised only in *GEICO General Insurance Co. v. Edo*, No. 06-100, this brief does not discuss facts relevant to the consolidated case, *Safeco Insurance Co. of America v. Burr*, No. 06-84. All citations herein to the Petition Appendix ("Pet. App.") are to the appendix attached to the petition filed in No. 06-100.

deemed to have taken "adverse action" with respect to Edo when it offered him insurance.

In December 2000, Edo called GEICO and requested a rate quote for automobile insurance. After obtaining a "credit score" for Edo from a consumer reporting agency, GEICO offered Edo an insurance policy with its standard-rate company, GEICO Indemnity Co. – an offer that Edo accepted. GEICO determined that the rate offered to Edo (whose credit score was better-than-average) was no higher than the rate he would have received had his credit report not been taken into account. Pet. App. 14a. Based on that determination, GEICO concluded (in accordance with its then-standard policy for addressing "adverse action" issues) that it had not taken any "adverse action" with respect to Edo within the meaning of 16 U.S.C. § 1681a(k)(1)(B)(1). Accordingly, GEICO did not send Edo notice of an adverse action.

Edo thereafter filed a putative class action against GEICO under the FCRA. Edo alleged that various GEICO entities violated § 615(a) of the FCRA, 15 U.S.C. § 1681m(a), by failing to provide notice of adverse action taken against him. Edo alleged that the rate offered to him constituted "adverse action" because he would have been offered a lower rate if he had had the highest-possible credit score. Although Edo did not claim to have suffered injury, he claimed entitlement to statutory damages of $100 per class member plus attorney fees because, he alleged, GEICO's violation was "willful[]" within the meaning of § 616(a) of the FCRA, 15 U.S.C. § 1681n(a).

In February 2004, the district court granted summary judgment to all defendants and dismissed the action. Pet. App. 37a-48a. The district court ruled, *inter alia*, that GEICO Indemnity had not taken an "adverse action" against Edo

because "Plaintiff admits the premium charged to him by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history." *Id.* 46a.

The Ninth Circuit reversed. Pet. App. 1a-36a. It held that GEICO had, in fact, taken "adverse action" against Edo, stating:

> FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average customer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him.

Id. 20a-21a. The Ninth Circuit held that because Edo would have received a lower rate had he had the highest possible credit score, GEICO's rate quote constituted an adverse action and triggered § 1681m(a)'s notice requirement. *Id.* 21. After broadly defining what it means to "willfully" violate the FCRA notice requirement, the Ninth Circuit remanded the case to the district court for a determination of whether GEICO had "willfully" violated that requirement. *Id.* 30a-36a.

SUMMARY OF ARGUMENT

The Ninth Circuit's expansive definition of "adverse action" is inconsistent with both the structure and purpose of the FCRA. The appeals court based its definition on what it claimed was a straightforward understanding of the word

"increase";[3] it deemed a quoted rate an "increase[d]" rate if it was higher than the rate available to a person with a perfect credit score. Pet. App. 16a-17a, 20a-21. But the statute says no such thing. Indeed, although § 1681a(k)(1)(B)(i) uses the word "increase," it includes no benchmark reference whatsoever. That is, although the provision makes reference to an "increase" in insurance rates, it does not answer the question, "What is the rate from which an increase/decrease is to be measured?"

Although the failure to include language making explicit reference to such a benchmark creates a potential statutory ambiguity, an examination of the structure and purpose of the FCRA makes clear that the relevant benchmark rate is the rate an insurance applicant would have been charged had his or her credit score not been taken into account. Thus, an insurance applicant does not face "an increase in any charge" (and thus no "adverse action") if the quoted rate is the same or lower than the rate (s)he would have been charged had his or her credit score not been taken into account. Because GEICO quoted an insurance rate to Edo that was the same rate it would have quoted had it never consulted Edo's insurance score, GEICO did not take any adverse action and thus was under no obligation to notify Edo of any such adverse action.

When construing the responsibilities imposed by the FCRA on insurance companies and other users of consumer reports, it is important to bear in mind why Congress imposed such responsibilities. Congress was *not* responding to alleged irresponsible use of consumer reports by the business community. Rather, when it adopted the FCRA in 1970,

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[3] The FCRA defines an "adverse action" as including "an *increase* in any charge for . . . any insurance." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

Congress principal concern was to ensure the accuracy and fairness of reports issued by consumer reporting agencies. The FCRA imposed "adverse action" notification requirements on report users not because Congress deemed adverse actions to be in any way blameworthy, but because such notification would alert otherwise-unsuspecting consumers to negative information contained in those reports regarding their credit worthiness. Congress determined that if consumers were so informed, they would be in a position to contest negative credit information they deemed inaccurate and/or to take steps to rehabilitate their credit profile.

That legislative purpose indicates that Congress intended to impose notification requirements only when a consumer report user has acted in response to *negative* information contained in a report – otherwise, there is nothing in the report that needs to be "fixed." Yet, under the Ninth Circuit's interpretation, even consumers such as Edo who have good credit reports – just not as good a report as a multi-millionaire would have – must be sent "adverse action" notices any time they would have been quoted a lower insurance rate if they had had a perfect credit score. But a less-than-perfect credit score is no indication that one's file contains negative information; it may simply reflect that one is thrifty and has engaged in fewer credit transactions than creditors deem optimal. Under those circumstances, requiring consumer report users to provide "adverse action" notification serves none of Congress's intended purposes. If, alternatively, notification were required whenever consulting a consumer report results in an insurance rate quote that is higher than if no report had been consulted, Congress's purposes would be served – because under those circumstances it is highly likely that the report contains information that a reasonable consumer would deem "negative" and thus a cause for concern.

The improbability that Congress intended to require that "adverse action" notice be sent to millions of consumers with good credit is heightened when one considers the likely counter-productiveness of such notice. Consumers who receive such notices on a regular basis are likely to begin ignoring them, thereby potentially missing an opportunity to correct erroneous credit information. Alternatively, consumers with good credit who have received such notices may inaccurately conclude that their consumer reports contain negative information and may refuse business requests for permission to run a credit check, a refusal that almost surely would be against their financial interest.

The *structure* of the FCRA also supports the conclusion that insurers are not required to provide "adverse action" notice unless negative information in a consumer report caused them to quote a higher rate than they would have quoted had they not consulted the report. As noted above, the FCRA imposed the notification requirement not as a means of inhibiting companies from taking adverse actions against consumers, but as a means of alerting consumers that their credit reports contain negative information. Accordingly, there is no reason to conclude that Congress would impose stricter notification requirements on one industry than on another, because Congress's purpose (alerting consumers) is identical with respect to all users of consumer reports, regardless what industry they might happen to be in. Congress recently adopted the Fair and Accurate Credit Transactions Act of 2003 (FACTA), 108 Pub. L. 159, 117 Stat. 1952 (2003), to amend the FCRA to clarify that a provider of credit who runs a credit check on a consumer need not provide FCRA notice unless the use of credit information results in an offer of credit with terms that are "materially less favorable then the most favorable terms available to a substantial portion of [the company's] consumers." The Ninth Circuit's standard – which requires

that notice be sent to all but a small minority of insurance consumers with the very best credit scores – is wholly inconsistent with the FACTA standard. There is no plausible reason to suppose that Congress intended to impose so much stricter notification requirements on the insurance industry when notice from insurers and notice from creditors serve an identical congressional purpose: to alert consumers to negative credit information.

The Ninth Circuit's standard is also inconsistent with the commonly understood meaning of an "adverse" action. Certainly, the average person would not think that she has been treated "adverse[ly]" simply because it is theoretically possible that she could have received better treatment, if she nonetheless has been treated as well or better than the typical person in the large group of which she is a member. Indeed, when this Court has used the phrase "adverse action," as it has done with some frequency in connection with employment discrimination law, it has never used it in the manner that the Ninth Circuit has attributed to Congress in connection with the FCRA.

Finally, the legislative history of the FCRA is consistent with the understanding that GEICO did not take any "adverse action" with respect to Edo. An explicit definition of "adverse action" was not added to the FCRA until 1996; but nothing in the pre-1996 statutory language or committee reports supports the Ninth Circuit's view that Congress intended to require notice to consumers who, like Edo, were not disadvantaged by any the information contained in their credit reports.

ARGUMENT

I. THE NINTH CIRCUIT'S EXPANSIVE DEFINITION OF "ADVERSE ACTION" IS INCONSISTENT WITH THE STRUCTURE AND PURPOSE OF THE FCRA

The FCRA defines an "adverse action" as including "an increase in any charge for . . . any insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). The Ninth Circuit concluded that an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score." Pet. App. 20a. The appeals court said that conclusion was mandated by the plain meaning of the word "increase," which "means to make something greater." *Id.* 16a (citing four dictionary definitions of the word "increase"). The court said that the rate offered to Edo was an "increase" over the rate he would have been offered if he had a perfect credit score – and thus that GEICO was required to send Edo an "adverse action" notice by virtue of § 1681m(a), which requires such notice when a person takes any "adverse action" with respect to a consumer that is "based in whole or in part on any information contained in a consumer report." *Id.* 20a-21a.

But that construction of § 1681a(k)(1)(B)(i) required the Ninth Circuit to read into the statute words that simply are not there. In particular, the statute does not state that the rate an insurance applicant "would have been offered if he had a perfect credit score" is the benchmark against which an "increase" is to be measured. Indeed, the statute includes no benchmark reference whatsoever. That is, although the statute makes reference to an "increase" in insurance rates, it does not answer the question, "What is the rate from which an increase/decrease is to be measured."

The failure to include language making explicit reference to such a benchmark creates a potential ambiguity in the meaning of § 1681a(k)(1)(B)(i). However, any ambiguity is eliminated when one considers the "adverse action" issue in light of the overall structure and purpose of the FCRA. As this Court has explained, "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). A reviewing court should not "confine itself to examining a particular statutory provision in isolation," because "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

An examination of the structure and purpose of the FCRA makes clear that the relevant benchmark rate, for purposes of § 1681a(k)(1)(B)(i), is the rate an insurance applicant would have been charged had his or her credit score not been taken into account. Thus, an insurance applicant does not face "an increase in any charge" (and thus no "adverse action") if the quoted rate is the same or lower than the rate (s)he would have been charged had his or her credit score not been taken into account. Because GEICO quoted an insurance rate to Edo that was the same rate it would have quoted had it never consulted Edo's insurance score, GEICO did not take any adverse action and thus was under no obligation to notify Edo of any such adverse action.[4]

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[4] WLF takes no position on an issue raised below but not at issue before this Court: whether an insurance company can ever be said to (continued...)

A. Congress's Purposes in Adopting the FCRA Indicate that the Ninth Circuit Chose an Inappropriate Benchmark for Determining Whether There Has Been an "Increase" in a Charge for Insurance

Congress's purposes in adopting the FCRA are set forth in 15 U.S.C. § 1681:

> **(a) Accuracy and fairness of credit reporting.** The Congress makes the following findings:
>
> (1) The banking system is dependent upon fair and accurate reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.
>
> (2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.
>
> (3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

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[4](...continued)
have undertaken "an increase in any charge for . . . any insurance" within the meaning of § 1681a(k)(1)(B)(i), when a new insurance policy is at issue and the company has never previously quoted a rate to the customer. Given that the issue is not directly raised, WLF urges the Court to avoid expressing a view on the issue in its decision. Indeed, in light of the huge potential liability facing insurance companies from suits alleging willful failure to provide "adverse action" notices, WLF urges the Court to limit its ruling regarding what constitutes an "adverse action" to the precise issue raised by GEICO.

> (4) There is a vital need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and with respect for the consumer's right to privacy.
>
> **(b) Reasonable procedures.** It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

As § 1681 makes clear, the FCRA was adopted for the principal purpose of regulating the conduct of credit reporting agencies, not the conduct of companies that use data supplied to them by credit reporting agencies. Congress mandated that consumer reporting agencies adopt "reasonable procedures" designed to ensure the accuracy and fairness of their reports. Requirements imposed by the FCRA on report users must be viewed in that light: the purpose of those requirements was to assist in the effort to improve the accuracy and fairness of reports, not to limit users' rights to draw adverse inferences from the reports. The FCRA imposed "adverse action" notification requirements on report users not because Congress deemed adverse actions to be in any way blameworthy, but because such notification would alert otherwise-unsuspecting consumers to negative information contained in those reports regarding their credit worthiness. Congress determined that if consumers were so informed, they would be in a position to contest negative credit information they deemed inaccurate and/or to take steps to rehabilitate their credit profile. *See generally, TRW, Inc. v. Andrews*, 537 U.S. 19, 23 (2001); S.

Rep. 91-517 (Nov. 5, 1969) at 1-2 ("The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report. . . . [T]he consumer has a right to know when he is being turned down for credit, insurance, or employment because of adverse information in a credit report and to correct any erroneous information in his credit file.").

That legislative purpose presupposes, then, that the information that consumers have a right to see is *negative* information for which consumers might have reason to seek correction. As the Senate Committee on Banking and Currency explained the legislative concern that Congress sought to address in adopting the "adverse action" notification requirement:

> One problem which the hearings on S. 823 identified is the inability at times of the consumer to know he is being damaged by an adverse credit report. Standard agreements between credit reporting agencies and the users of their reports prohibit the user from disclosing the contents of the report to the consumer. In some cases, the user is even precluded from mentioning the name of the credit reporting agency. Unless the person knows he is being rejected for credit or insurance or employment because of a credit report, he has no opportunity to be confronted with the charges against him and tell his side of the story.

Id. at 3.

Neither the statutory language nor the FCRA's legislative history suggests that Congress sought to require that consumers be notified regarding innocuous information to which they are extremely unlikely to object – such as that the

consumer is not a multi-millionaire. Yet, the Ninth Circuit's definition of "adverse action" will require just such notifications. According to the Ninth Circuit, even consumers such as Edo who have good credit reports – just not as good a report as a multi-millionaire would have – must be sent "adverse action" notices any time they would have been quoted a lower insurance rate if they had had a perfect credit score. But a less-than-perfect credit score is no indication that one's file contains negative information; it may simply reflect that one is thrifty and has engaged in fewer credit transactions than creditors deem optimal. Under those circumstances, requiring consumer report users to provide "adverse action" notification serves none of Congress's intended purposes.

The benchmark proposed by GEICO – that the "adverse action" notification requirement is not triggered unless information contained in a consumer report causes an insurance rate to "increase" above the rate that would have been charged if no report had been consulted – is far more consistent with the purposes Congress sought to achieve by imposing that requirement. Under those circumstances, it is far more likely that the report contains information that a reasonable consumer would deem "negative" and thus a cause for concern. Moreover, the proposed benchmark – the rate that would have been charged if no report had been consulted – is not some "made up" number with no basis in reality. Rather, as the Ninth Circuit recognized, GEICO does in fact compute a "'neutral' credit weight" that is used in determining insurance rates for many of its customers. Pet. App. 13a.[5] Accordingly, by calculating an insurance rate for a customer

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[5] In particular, GEICO applies the "neutral" credit weight to all customers in those States that prohibit or restrict the use of customer-specific credit reports in calculating insurance rates. The "neutral" credit weight is in essence the average credit rating of all consumers.

that takes into account the customer's credit score, and then recalculating an insurance rate for the customer using a "neutral" credit weight, companies such as GEICO can quickly determine whether use of the credit score has caused the insurance rate to be higher than it would have been had no credit report been consulted. Sending "adverse action" notices to customers falling within that category provides notice to the very consumers whom the FCRA was intended to protect.

The evidence is overwhelming that adopting the Ninth Circuit's interpretation of "adverse action" will result in "adverse action" notices being sent to millions of consumers with very good credit scores. At many insurance companies, fewer than 15% of insureds receive the best rate available. *See* Michigan Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance,* Apps. C & D (2002). No doubt some of the 85% of consumers who are quoted higher rates fail to qualify for the best rate for reasons unrelated to their credit score. But those figures nonetheless underscore the anomaly of the Ninth Circuit's decision: it will result in millions of consumers being "alerted" to non-existent credit problems, a result not contemplated or intended by the FCRA. Indeed, such "false alarms" are likely to be counter-productive. Consumers who receive such notices on a regular basis are likely to begin ignoring them, thereby potentially missing an opportunity to correct erroneous credit information. As the Federal Trade Commission has acknowledged, "[I]f you give notices too widely and in too many circumstances, then it . . . becomes something that people ignore." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs,* 198th Cong. 95-96 (2003) (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, U.S. Federal Trade Comm'n).

Moreover, other consumers who receive such notices may erroneously conclude that there really is something wrong with their credit rating. They may respond by refusing business requests for permission to run a credit check. For Edo and many other consumers with above-average credit scores, efforts to prevent business from learning their credit scores could only work to their financial disadvantage.

In sum, the interpretation of § 1681a(k)(1)(B)(i) adopted by the Ninth Circuit is implausible because it runs counter to the essential purpose of the FCRA: to alert consumers whenever negative information in their credit histories is interfering with their ability to obtain insurance. Indeed, by requiring "adverse action" notices to be sent in millions of instances in which no such negative information exists, the Ninth Circuit is undermining the purpose of the notice requirement by discouraging appropriate action by those whose reports really do contain negative information.

B. The Ninth Circuit's Decision Is Inconsistent with the Structure of the FCRA, Which Indicates an Intent to Impose Similar Notification Requirements on All Users of Consumer Reports, Without Regard to the Industry Involved

The *structure* of the FCRA also supports the conclusion that insurers are not required to provide "adverse action" notice unless negative information in a consumer report caused them to quote a higher rate than they would have quoted had they not consulted the report.

The FCRA requires users of consumer reports in a wide variety of industries to notify consumers whenever information contained in a report leads the user to treat the consumer less favorably. Users explicitly named in the FCRA include those

using consumer reports in connection with insurance underwriting decisions (§ 1681a(k)(1)(B)(i)); hiring and other employment-related decisions (§ 1681a(k)(1)(B)(ii)); granting license benefits (§ 1681(a)(k)(1)(B)(iii)); and extending credit (§ 1681a(k)(1)(A). The FCRA also includes a miscellaneous category that extends "adverse action" notification requirements to anyone using credit reports in connection with an action taken or determination made in response to any "application," "transaction," or "review of an account" initiated by a consumer. *See* § 1681a(k)(1)(B)(iv).

But as noted above, Congress did not impose these notification requirements as a means of inhibiting users of consumer reports from taking adverse actions against consumers. Rather, the purpose of such notification requirements was *precisely the same* with respect to all the various types of users covered by the FCRA: to alert consumers that their credit reports contain negative information, thereby giving those consumers an opportunity to respond appropriately to the source of the consumer report. 15 U.S.C. § 1681(a) & (b). Because Congress's purpose (alerting consumers) is identical with respect to all users of consumer reports, there is no reason to expect that Congress would impose stricter notification requirements on one industry than on another. Rather, one would expect that the level of "negativity" required to trigger a notification requirement would be relatively uniform from industry to industry. The Ninth Circuit's decision is inconsistent with this basic structure of the FCRA because it would impose much stricter notification requirements on the insurance industry than on providers of credit.

It is important to recognize that when the FCRA was adopted in 1970, the principal use of consumer reports was to determine whether to do business with a consumer at all, not

to determine pricing. Thus, although pricing issues have always been subject to the FCRA, Congress was focused primarily on refusals to deal when it drafted the FCRA. *See, e.g.*, S. Rep. 91-517 (1969) at 1 (purpose of legislation was to ensure notification of the individual "whenever an individual is *rejected* for credit, insurance or employment because of an adverse credit report.") (emphasis added). In the ensuing years, there was some uncertainty regarding when providers of credit were required to provide notice of "adverse action" in cases in which they did not altogether refuse to extend credit. By at least 1996, it had been clearly established that the "adverse action" notification requirements were not triggered in at least one such circumstance: when a consumer applies for credit under one set of terms, a credit provider (after consulting a credit report) responds by offering credit on less generous terms, and the consumer accepts the counteroffer.[6]

Finally, Congress sought to provide further clarification with respect to notice requirements imposed on providers of credit that use consumer reports, by adopting FACTA in 2003. FACTA amends the FCRA to clarify that a provider of credit who runs a credit check on a consumer need not provide FCRA notice unless the use of credit information results in an offer of credit with terms that are "materially less favorable than the most favorable terms available to a substantial portion of [the company's] consumers." 15 U.S.C. § 1681m(h)(1).[7]

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[6] That position was set forth in regulations adopted by the Federal Reserve under the Equal Credit Opportunity Act ("ECOA"). 12 C.F.R. § 202.2. The FCRA was then amended in 1996 to make clear that, with respect to providers of credit, "adverse action" was defined by reference to the definition in § 701(d)(6) of the ECOA, 15 U.S.C. § 1691(d)(6). *See* 15 U.S.C. § 1681a(k)(1)(A).

[7] Technically, the notification requirement imposed by § 1681m(h)(1) is separate from and in addition to "adverse action" (continued...)

In other words, Congress has clarified that a provider of credit is not required to notify a consumer simply because, based on his or her credit score, the consumer was offered credit terms that are not the absolutely best terms the provider of credit ever offers. Rather, notice is required only when the terms offered are "materially less favorable" than terms that are regularly offered to substantial numbers of other customers.

Because pricing issues have arisen less frequently in the insurance context, Congress has not had occasion to provide further clarification regarding when an insurance company's variable pricing policy triggers § 1681m(a)'s "adverse action" notification requirements. Nonetheless, for all the reasons stated above, there is no reason to conclude that Congress intended to impose significantly more onerous notification requirements on the insurance industry than on providers of credit. Were FACTA's rationale applied in this case, there can be no doubt that GEICO would not be required to provide "adverse action" notice to Edo: Edo may not have been quoted insurance rates that were as favorable as those that would have been offered to a multi-millionaire with an identical driving record, but the more favorable terms were not "materially" so and were not available to a "substantial" portion of GEICO's customers.

In contrast, applying the Ninth Circuit's definition of "adverse action" – which requires that notice be sent to all but

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[7](...continued)
notification requirements imposed on credit providers (and all other users of consumer reports) by § 1681m(a). However, the language and history of FACTA indicate that a credit provider that complies with the § 1681m(h)(1) notification requirement will also be deemed to have complied with the § 1681m(a) notification requirements.

a minority of insurance consumers with the very best credit scores – is wholly inconsistent with FACTA's rationale.

There is no plausible reason to suppose that Congress intended to impose so much stricter notification requirements on the insurance industry when notice from insurers and notice from creditors serve an identical congressional purpose: to alert consumers to negative credit information contained in consumer reports. We recognize that FACTA was not adopted until 2003, well after the FCRA imposed "adverse action" notification requirements on insurers and well after the events giving rise to this lawsuit. Nonetheless, given the history and structure of the FCRA and that FACTA was widely understood as a clarification of existing requirements, there is every reason to consider the FACTA amendments when determining what "adverse action" notification requirements Congress intended to impose on insurers. As this Court has explained, "[I]t is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, *even those subsequently enacted.*" *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 786 (2000) (emphasis added).

The Ninth Circuit's decision is also inconsistent with another important aspect of the FCRA's overall structure. The FCRA requires that users taking "adverse actions" on the basis of information contained in consumer reports must provide consumers with:

(1) notice of the adverse action;

(2) the name, address, and telephone number of the consumer reporting agency that furnished the consumer report, and a statement that the consumer reporting agency cannot explain why adverse action was taken

because it was the user, not the agency, that took the adverse action; and

(3) notice of the consumer's right to obtain a free copy of the consumer report and to dispute, with the consumer reporting agency, the accuracy or completeness of information contained in the consumer report.

15 U.S.C. § 1681m(a).

But the Ninth Circuit attempted to impose additional reporting requirements on insurers, beyond those explicitly required by the statute. Under the guise of interpreting what it means to provide "notice" of the adverse action, the appeals court held that insurers were also required to "describe the [adverse] action, specify the effect of the action upon the consumer, and identify the parties or parties taking the action." Pet. App. 24a.[8] The court simply made up out of whole cloth its requirement that the notice "specify the effect of the action on the consumer." The only requirement included in the statute is that the insurer must provide "notice" – which cannot reasonably be interpreted to mean anything more than a statement that, based on information in the consumer report, the insurer has decided to "increase" the charge for insurance. Such notice is fully adequate to serve the FCRA's purpose: to put consumers on notice that there is negative information in their consumer reports that they may wish to investigate.

It is not difficult to discern why the Ninth Circuit may have felt compelled to make up additional notification

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[8] In requiring that the party or parties taking the action be identified, the Ninth Circuit made clear that when a family of insurance companies was involved in the transaction, the notice must specify the role played by each corporate entity. *Id.* 26a.

requirements. Given that the Ninth Circuit's holding will require that "adverse action" notices be sent to millions of consumers with excellent credit whose consumer reports contain no "negative" information, the Ninth Circuit undoubtedly realized that notices that did no more than track the requirements of § 1681m(a) would lead to mass confusion among consumers. The court apparently hoped to lessen that confusion by imposing additional notice requirements on the user, such as that the user "specify" the effect of the action on the consumer.[9]

The Ninth Circuit's perceived need to make up additional notification requirements suggests that Congress had something entirely different in mind when it defined "adverse action." That Congress required little more by way of notice than a simple "notice of adverse action," § 1681m(a)(1), is a strong indication that Congress contemplated that notice would be required only in those instances in which the "adverse" nature of the action taken would be readily apparent to all. GEICO's suggested interpretation of "adverse action" is consistent with that congressional intent; the Ninth Circuit's is not.

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[9] In imposing that requirement, the Ninth Circuit appears to have had in mind something like, "Your credit score was a good one. As a result, we are quoting you an insurance rate that is less than that charged someone with a driving record similar to yours but with only an average credit score. Nonetheless, we are hereby giving you notice that we took 'adverse action' against you in the sense that your quoted rate would have been lower if you had had a 'perfect' credit score, a score achieved by only a small minority of consumers."

C. The Ninth Circuit's Definition of "Adverse Action" Is Inconsistent with the Commonly Understood Meaning of that Phrase

The Ninth Circuit's ruling is also inconsistent with the commonly understood meaning of an "adverse" action. Something is deemed "adverse" if it is "hostile," "opposed to one's interests," or "unfavorable." G. & C. Merriam Co., *Webster's New Collegiate Dictionary* (1981). Those are not words that spring to mind when an insurance company offers a rate that is not its best but is nonetheless better-than-average. It is hard to imagine that Congress would have used the word "adverse" in the FCRA in describing a concept that was intended to apply to as broad an array of insurance company actions as was specified by the Ninth Circuit.

Certainly, the average person would not think that she has been treated "adverse[ly]" simply because it is theoretically possible that she could have received better treatment, if she nonetheless has been treated as well or better than the typical person in the large group of which she is a member. An applicant for insurance can in some ways be analogized to a college applicant. If Stanford University offers admission and a substantial achievement-based scholarship to a high school valedictorian, no one using normal parlance would think that Stanford has taken an "adverse action" with respect to that student because others (*e.g.*, star athletes or those from impoverished backgrounds) are offered all-expenses-paid scholarships. To the contrary, most such valedictorians would consider themselves to have received favorable treatment, particularly when compared to students who received no financial aid or were rejected for admission. WLF respectfully submits that it is equally implausible that Congress would have described analogous conduct by insurance companies as "adverse action."

Indeed, when this Court has used the phrase "adverse action," as it has done with some frequency in connection with employment discrimination law, it has never used it in the manner that the Ninth Circuit has attributed to Congress in connection with the FCRA. For example, the court regularly uses the phrase "adverse employment action" as shorthand for the types of employer actions that can be the subject of lawsuits alleging a violation of Title VII or other anti-discrimination statutes.[10] In using that phrase (or similar phrases including the word "adverse"), the Court has never intended to suggest thereby that an employer's conduct is actionable any time that it subjects the plaintiff-employee to anything less than optimal treatment. Rather, the Court has reserved the phrases "adverse action" and "adverse employment action" for situations in which the employer's conduct materially affects the employment relationship. Thus, for example, the Court held recently in *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2408, 2415 (2006), that an employer does not violate 42 U.S.C. § 2000e-3(a) – which forbids an employer from "discriminating against" an employee or job applicant for participating in a Title VII proceeding against the employer – unless the employer engages in "adverse action" sufficient to dissuade a "reasonable worker from making or supporting a charge of discrimination." The Court explained that minor harms – "normal petty slights, minor annoyances, and simple lack of good manners" – do not meet that standard and thus are not actionable. *Id.* at 2415. Federal courts have been using the phrase "adverse action" in the employment context since before the FCRA was adopted by Congress in 1970. *See, e.g.*,

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[10] *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 523-24 (1993) (Title VII permits damage awards "against employers who are proven to have taken *adverse employment action* by reason of race.") (emphasis added).

Pauley v. United States, 419 F.2d 1061, 1065 (7th Cir. 1969) (the plaintiff's transfer from an office in Chicago to an office in Washington was not sufficiently negative to constitute "adverse action" under federal civil service law, and thus did not trigger the plaintiff's right to a hearing). That understanding of the phrase "adverse action" is in sharp contrast to the understanding of the Ninth Circuit, which interpreted Congress's use of the phrase to encompass any insurance rate quote that is higher than the rate offered to those with *perfect* credit scores. WLF respectfully submits that when Congress used the phrase "adverse action" in the FCRA, it is far more likely that Congress intended that phrase to be interpreted as it is interpreted by federal courts in the employment discrimination context and in everyday usage, than that it intended an interpretation akin to the Ninth Circuit's in this case.

II. THE LEGISLATIVE HISTORY OF THE FCRA CONFIRMS THAT GEICO DID NOT TAKE ANY "ADVERSE ACTION" WITH RESPECT TO EDO

Because the purpose and overall structure of the FCRA are sufficient to demonstrate that the Ninth Circuit has misconstrued the meaning of the FCRA, there is no need to proceed further and examine the statute's legislative history. But such an examination would only confirm that the Ninth Circuit erred in its interpretation.

Prior to 1996, the FCRA did not include a definition of "adverse action," even though that phrase appeared in § 1681m(a). The pre-1996 version of that section, which set forth the notice obligations of users of consumer reports, provided as follows:

> Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or *the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report* from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

15 U.S.C. § 1681m(a) (1995) (emphasis added).

This pre-1996 version of the law is no more susceptible to the Ninth Circuit's interpretation than is the current version. The provision referred to an "increase" in the charge for insurance, but it includes no benchmark for determining whether the charge has been increased or decreased. For all the reasons articulated above in connection with the current version of the FCRA, there is no basis for concluding that the pre-1996 version intended to require notification for consumers whose rates were no higher than if their consumer reports had not been consulted.

In his Ninth Circuit brief, Edo sought to rely on House and Senate reports from the early 1990s that stated that the "adverse action" notification requirements should be read broadly. Appellant's Opening Ninth Circuit Br. 43. WLF notes initially that those reports were issued in connection with proposed legislation that was never enacted. More importantly, Edo's argument misconstrues what Congress was attempting to accomplish in the early 1990s. The authors of those reports were not seeking to broaden the "adverse action" notification requirements as they applied to insurance companies and providers of credit. Rather, they were reacting

negatively to a 1990 Federal Trade Commission (FTC) determination that those requirements did not apply outside the areas of credit, insurance, or employment. In May 1990, an FTC commentary had held:

> The [FCRA] does not require that a [consumer] report user provide any notice to consumers when taking adverse action not relating to credit, insurance, or employment. For example, a landlord who refuses to rent an apartment to a consumer based on credit or other information in a consumer report need not provide the notice. Similarly, a party that uses credit or other information in a consumer report as a basis for refusing to accept payment by check need not comply with this section. Checks have historically been treated as cash items, and thus such refusal does not involve a denial of credit, insurance, or employment.

FTC Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18804, 18826 (May 4, 1990, codified at 16 C.F.R. Part 600).

One apparent purpose of the 1996 amendments to the FCRA was to overturn that restrictive feature of the May 1990 commentary. The Consumer Credit Reporting Act of 1996 (CCRA), P.L. 104-208, included as part of its newly added section defining "adverse action," a provision defining "adverse action" in connection with miscellaneous business activities. *See* 15 U.S.C. § 1681a(k)(1)(B)(iv). Accordingly, such activities as renting apartments and deciding whether to accept checks from consumers are now subject to the FCRA's "adverse action" notification requirements. But nothing in either the CCRA or any of the congressional reports preceding adoption of the CCRA gives any indication that Congress intended the CCRA to expand the scope of the "adverse

action" notification requirements that had previously been imposed on insurance companies.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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Dated: November 13, 2006